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Real Estate for Estate Attorneys: Handling Real Property Transfers in Estate Matters & Recognizing Estate Planning Issues in Real Property Transfers

Trusts & Estates Law Section

October 18-19, 2018

The Sagamore Resort
Bolton Landing, NY

This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.

MCLE INFORMATION

Program Title:**Trusts and Estates Law Section 2018 Fall Meeting**
Date/s:October 18-19, 2018 Location: Bolton Landing, NY

Evaluation: https://nysba.co1.qualtrics.com/jfe/form/SV_b43cZSeQaQVbSDP
This evaluation survey link will be emailed to registrants following the program.

Total Credits: **6.0 New York CLE credit hours**

Credit Category:

5.0 Areas of Professional Practice	0.0 Law Practice Management
1.0 Ethics and Professionalism	0.0 Skills

This course is approved for credit for **experienced attorneys only**. This course is not transitional and therefore will not qualify for credit for newly admitted attorneys (admitted to the New York Bar for less than two years).

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff
2) Complete and return a **Form for Verification of Presence** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Form for Verification of Presence certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also provided above.

ADDITIONAL INFORMATION AND POLICIES

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

For official New York State CLE Board rules, please see www.nycourts.gov/attorneys/cle. In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format. The transitional CLE requirement for newly admitted attorneys does not include the Diversity, Inclusion and Elimination of Bias CLE credit component.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or the NYSBA Member Resource Center at (800) 582-2452 (or (518) 463-3724 in the Albany area).

SCHEDULE OF EVENTS

Real Estate for Estate Attorneys: Handling Real Property Transfers in Estate Matters & Recognizing Estate Planning Issues in Real Property Transfers

Most clients own, and their estates will contain, real estate – whether a modest house, an heirloom lake front cottage, or a condo or cooperative apartment in New York City – that needs to be planned for properly. As Estate attorneys, at some point in time we will be advising our clients regarding the transfer of title, keeping real property in the family for future generations, strategies for administering an entity holding real estate over time, or protecting it from loss to creditors or care expenses. This meeting will help you advise your clients in all of those areas. We will also take a close look at how the Power of Attorney and Gift Rider can be utilized in estate planning and cover the ethical issues that can arise from time to time.

Thursday, October 18

10:30 a.m. – 5:00 p.m.	**Registration** – Conference Center Foyer
10:30 a.m. – 5:00 p.m.	**Exhibitors** – Wapanak Room
12:00 p.m. – 2:00 p.m.	**Executive Committee Luncheon Meeting** – Bellvue Room
2:00 p.m. – 5:00 p.m.	**General Session** – Nirvana Room
2:00 p.m. – 2:05 p.m.	**Welcome and Introductory Remarks** – Natalia Murphy, Esq., Section Chair
2:05 p.m. - 2:10 p.m.	**NYSBA Welcome** – Michael Miller, Esq., New York State Bar Association President
2:10 p.m. – 2:15 p.m.	**Program Introduction** – Program Co-Chairs, Carl T. Baker, Esq. and Katie Lynagh, Esq.
2:15 p.m. – 3:10 p.m.	**Deeds and Misdeeds: Avoiding Real Property Transfer and Planning Pitfalls** Real estate lawyers often fail to recognize estate planning issues inherent in transfers of homes, condominiums, or cooperative apartments. Similarly, trusts and estate lawyers often fail to anticipate title, lender, or other real property issues that can be avoided with diligence and knowledge. This session provides strategies on how to deal with common traps when structuring and documenting real property transfers both during life and after death. **Speakers:** **Joseph T. La Ferlita, Esq.**, Farrell Fritz, P.C., Uniondale, NY **Albert B. Kukol, Esq.**, Levene Gouldin & Thompson, LLP, Vestal, NY
3:10 p.m. – 4:00 p.m.	**Keeping the "Heirloom" Property in the Family** The family lakeside cabin, ski chalet, or beach retreat may generate a lifetime of fond memories, and when the client wants to keep it in the family for future generations the planning attorney is presented with a complex set of drafting challenges. When Is a Trust preferred to an entity such as a Limited Liability Company? What are the most significant drafting concerns for an entity agreement or testamentary instrument? What are the practical considerations and options for funding and administering the entity? **Speakers:** **Timothy B. Borchers, Esq.**, Borchers Trust Law, Medway, MA **Christopher A. Cahill**, Twelve Points Wealth Management, Concord, MA
4:00 p.m. – 4:15 p.m.	**Break** – Wapanak Room, hosted by RDM Financial Group at High Tower
4:15 p.m. – 5:05 p.m	**Advising Fiduciaries on the Administration of Closely-Held Real Estate Entities** Executors and trustees often step into the shoes of a decedent who was a partner or member of an entity owning real estate. Such fiduciaries may also own an interest in the entity in their individual capacity. What provisions should be included in the governing instrument to protect such fiduciaries? Where they control the entity in their fiduciary or individual capacity, what guidelines should be employed to navigate the many decisions that arise in connection with ongoing operations? What advice should be given to a fiduciary who faces potential conflicts with respect to business decisions at the entity level and fiduciary decisions at the estate or trust level? Finally, under what circumstances does a fiduciary have a duty to account to the trust or estate beneficiaries for his entity-level activities? **Speakers:** **Quincy Cotton, Esq.**, Roberts & Holland LLP, New York City **Anne C. Bederka, Esq.**, Greenfield Stein & Senior, LLP, New York City

SCHEDULE OF EVENTS

6:00 p.m. – 10:00 p.m. **Cocktail Reception and Dinner** – DOLLAR ISLAND TERRACE AND SHELVING ROCK TERRACE
Enjoy panoramic views of Lake George and sweeping fall foliage starting with cocktails on the Dollar Island Terrace followed by dinner on the climate-controlled and tented Shelving Rock Terrace.

Friday, October 19

8:00 a.m. – 12:30 p.m. **Registration – Conference Center Foyer**
Breakfast and Exhibitors – Wapanak Room

8:00 a.m. – 9:00 a.m. **Committee Breakfast Meetings** – Bellvue Room
The section committees will be meeting informally over breakfast. We welcome you to take this opportunity to connect with colleagues and learn more about how to get involved in the wide variety of committees.

9:00 a.m. – 9:10 a.m. **General Session** – Nirvana Room

Program Introduction – Program Co-Chairs Carl T. Baker, Esq. and Katie Lynagh, Esq.

9:10 a.m. – 10:00 a.m. **Protecting the Property**
Often a home, however modest, may be a client's most valuable asset and an asset the client would like to protect and preserve for the client's heirs. What are the options for titling and transferring real estate to protect it from the risks of future creditors or uninsured long term care expenses? What structures work and what are their tax consequences? What controls and protections can the client maintain?

Speaker:
Frances M. Pantaleo, Esq., Bleakley Platt & Schmidt, LLP, White Plains, NY

10:00 a.m. – 10:50 a.m. **Agency – The Power of Attorney and Its Role in Real Property Planning**
The Power of Attorney is a basic tool for the estate planner and a needed document for most clients. This session will address issues that practitioners are having when needing to use the document and cover best practices for execution and gaining acceptance of the Power of Attorney by title companies, financial institutions and others.

Speaker:
Ellen Makofsky, Esq. CELA, Makofsky & Associates, PC., Garden City, NY

10:50 a.m. – 11:05 a.m. **Coffee Break with Exhibitors** – Wapanak Room, Hosted by MPI Business Valuation & Advisory

11:05 a.m. – Noon **Real Estate in Estates: An Ethical Trap for the Unwary?**
Many estates involve the transfer of real property and very often a decedent's home is one of the main assets in the estate. The transfer and administration of real property can be a trap for the unwary and often creates significant tension among estate beneficiaries, intestate distributees and fiduciaries. Hear about some of the most common issues seen in Surrogate's Court related to real property and the ethical challenges to counsel.

Speaker:
Hon. Stacy L. Pettit, Albany County Surrogate's Court Judge, Albany, NY

12:00 p.m. **Adjourn** – Closing Remarks – Natalia Murphy, Esq., Section Chair

Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

Join Our Section

☐ As a NYSBA member, **PLEASE BILL ME $40 for Trusts and Estates Law Section dues.** (law student rate is $5)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Trusts and Estates Law Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:
MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

Join a Trusts and Estates Law Section Committee(s)

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

___ Charitable Planning (TRUS1100)
___ Continuing Legal Education (TRUS1020)
___ Diversity (TRUS2800)
___ Elderly and Disabled (TRUS1700)
___ Estate and Trust Administration (TRUS1400)
___ Estate Litigation (TRUS1200)
___ Estate Planning (TRUS1300)
___ International Estate Planning (TRUS1600)
___ Legislation and Governmental Relations (TRUS1030)
___ Life Insurance and Employee Benefits (TRUS1800)
___ Membership and Law Students (TRUS1040)
___ Multi-State Practice (TRUS2400)
___ Newsletter and Publications (TRUS1900)
___ New York Uniform Trust Code (TRUS2900)
___ Practice and Ethics (TRUS2100)
___ Surrogates Court (TRUS2200)
___ Taxation (TRUS2300)
___ Technology in Practice (TRUS2500)

2019 ANNUAL MEMBERSHIP DUES
Class based on first year of admission to bar of any state.
Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP	
Attorneys admitted 2011 and prior	$275
Attorneys admitted 2012-2013	185
Attorneys admitted 2014-2015	125
Attorneys admitted 2016 - 3.31.2018	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP	
Attorneys admitted 2011 and prior	$180
Attorneys admitted 2012-2013	150
Attorneys admitted 2014-2015	120
Attorneys admitted 2016 - 3.31.2018	60

OTHER	
Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2018

NYSBA

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Deeds and Misdeeds: Avoiding Real Property Transfer and Planning Pitfalls

Joseph T. La Ferlita, Esq.
Farrell Fritz, P.C., Uniondale, NY
Albert B. Kukol, Esq.
Levene Gouldin & Thompson, LLP, Vestal, NY

NYSBA Trusts & Estates Law Section
Fall 2018 Meeting
Deeds and Misdeeds: Avoiding Real Property Transfer & Planning Pitfalls
Co-presented by:
Joseph T. La Ferlita, Esq.
Partner, Farrell Fritz, P.C.

A Sampling of Issues to Bear In Mind When Planning for, and Administering, Plans Involving Residential Assets

1. Transfers of a Cooperative Apartment

a. Transfers During Shareholder's Lifetime to an *Inter Vivos* Trust
   i. Why doing so might be prudent
   ii. The potential obstacle
   iii. Possible solutions

b. Transfers Upon Shareholder's Death to a Beneficiary (Individual or Trust)
   i. Beneficiary must obtain approval of the cooperative corporation's board of directors in order to become a resident of the coop.
   ii. How to proceed if the board of directors rejects the beneficiary's application for residency.
      1. Possible statutory amendment in the works

2. NYS Estate Taxation of NY Real Property Owned By Nonresidents of New York

a. Basic rules regarding includability of property in NY gross estate of Nonresident of NY
   i. Tangible personal property
   ii. Intangible personal property
   iii. Real property

b. Transforming ownership of NY real property into intangible personal property
   i. Problem of single-member LLCs, LLCs without a business purpose, and revocable trusts

3. Clients Who Are Non-U.S. Persons Buying Real Property in NY

a. Non-U.S. Persons Are Not Taxed Like U.S. Persons
   i. Definitions:
      1. Nonresident Alien: A nonresident alien is an individual who is not a U.S. citizen or a resident alien.
      2. U.S. Person:
         a. A citizen or resident of the United States,

b. A partnership created or organized in the United States or under the law of the United States or of any State, or the District of Columbia,
c. A corporation created or organized in the United States or under the law of the United States or of any State, or the District of Columbia,
d. Any estate or trust other than a foreign estate or foreign trust. (See Internal Revenue Code section 7701(a)(31) for the definition of a foreign estate and a foreign trust.), or
e. Any other person that is not a foreign person.

3. U.S. Citizen:
    a. An individual born in the United States,
    b. An individual whose parent is a U.S. citizen,
    c. A former alien who has been naturalized as a U.S. citizen,
    d. An individual born in Puerto Rico,
    e. An individual born in Guam, or
    f. An individual born in the U.S. Virgin Islands.
4. Resident Alien:
    a. An individual who is not a citizen or national of the United States and who meets either the green card test or the substantial presence test for the calendar year.
        i. The substantial presence: being physically present in the United States on at least:
            1. 31 days during the current year, and
            2. 183 days during the 3-year period that includes the current year and the 2 years immediately preceding the current year, by adding together the following:
                a. All the days you were present in the US in the current year, and
                b. 1/3 of the days you were present in the US in the first year before the current year, and
                c. 1/6 of the days you were present in the US in the second year before the current year.
5. Domestic Corporation: one that was created or organized in the United States or under the laws of the United States, any of its states, or the District of Columbia.
6. Foreign Corporation: one that does not fit the definition of a domestic corporation.

ii. Comparison of Gift Tax Law for U.S. and Non-U.S. Persons
    1. U.S. Persons: subject to U.S. gift tax on gratuitous transfers of worldwide assets.
        a. $15,000 annual exclusion per donee

b. Unlimited deduction for gift to U.S. spouse
c. $11,180,000 combined gift/estate tax exemption

2. Non-U.S. Persons: subject to U.S. gift tax on gratuitous transfers of assets deemed located in the U.S.
    a. Same $15,000 annual exclusion per donee
    b. Annual exclusion for gift to spouse who is non-U.S. person is limited to $152,000 (not an unlimited marital deduction)
    c. U.S. situs property:
        i. real property located in the U.S.
        ii. tangible personal property located in the U.S.
            1. the situs of intangible person property generally is deemed to be the domicile of the donor, and, thus, is not subject to the U.S. gift tax.
                a. A non-U.S. person's transfer of stock in a U.S. corporation, including a U.S. real property holding corporation, is not subject to the U.S. gift tax.
                    i. Important for the non-U.S. person to respect the separate identity of the corporation (e.g., corporation should have its own accounts, act in its own name, hold board meetings); otherwise IRS may be able to treat the transfer of stock as a transfer of real property located in the U.S.

iii. Brief Comparison of Estate Tax for U.S. and Non-U.S. Persons
1. U.S. persons: subject to U.S. estate tax on testamentary transfers of worldwide assets.
    a. $11,180,000 combined lifetime/testamentary exemption
2. Non-U.S. persons: subject to U.S. estate tax on assets located in the U.S.
    a. Includes U.S. real property if the non-U.S. person gifted it to a foreign trust and retained an interest in the income from, or in the use of, the foreign trust's property
    b. $60,000 estate tax exemption
3. Jointly-Held Property
    a. Non-Spouses: IRC section 2040(a): a tracing rule. If property is held by a decedent and other persons as joint tenants with the right of survivorship, the value of the jointly held property included in the estate of the first joint tenant to die is based on the amount of consideration the

deceased joint tenant originally provided to acquire such property and to pay for subsequent capital improvements thereon.

b. Spouses: IRC section 2040(b): tracing not applicable. If a decedent and the surviving spouse are the only joint tenants of the property, 50% of the value of the property will be includible in the deceased spouse's gross estate, regardless of the amount of consideration provided by either spouse.
    i. *However*, according to the IRS, IRC section 2040(b) does not apply if the surviving spouse is not a U.S. citizen at the time of the decedent's death. In this case, the tracing rule applies, even if the decedent spouse is a U.S. citizen.
        1. But is that correct? Is Treasury Regulation 20.2056A-8(a)(1) invalid under Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 US 837 (1984))?

b. How Should a Non-U.S. Person Purchase U.S. Residential Real Property?
    i. Requires careful analysis and balancing of U.S. income and gift/estate tax implications. Often, there is no one structure that is ideal for each type of tax. Here, we touch on only a few – far from all -- factors to be considered.
    ii. Avoid:
        1. direct ownership of U.S. real property
        2. indirect ownership of U.S. real property through a U.S. corporation, U.S. trust, revocable foreign trust, or U.S. partnership, since in each case, the property could be subject to U.S. estate tax on his death.
    iii. Preferable structures from an estate tax perspective:
        1. Ownership through a foreign corporation.
            a. Avoids U.S. estate tax
            b. Possible negative U.S. income tax consequence – possible exposure to withholding or branch profits tax
        2. Ownership through a U.S. corporation subsidiary wholly owned by foreign corporation
            a. Avoids U.S. estate tax
            b. Avoids branch profits tax
            c. Sale of real property by the U.S. corporation subject to newly reduced U.S. corporate tax rate of 21%, but subsequent liquidation of the U.S. subsidiary not subject to U.S. tax
        3. Ownership through a foreign irrevocable trust
            a. Avoids U.S. estate tax if trust is established outside the does not have a U.S. fiduciary with control over substantial

decisions of the trust, and the grantor does not have powers over the U.S. real property in the trust

b. Creditor protection for the foreign trust could be achieved by having it own 100% of a U.S. LLC that, in turn, owns the U.S. real property

4. It Sounded Like a Good Idea at the Time: Some Potentially Problematic Dispositions of Real Estate

a. Life estates.
   i. Definition
   ii. Why some people use them
   iii. Potential problems
      1. Life tenant cannot afford the upkeep
      2. Life tenant wants to sell home and move (or take the money and run!), but remainderman wants to keep the property
      3. Life tenant fails to maintain the property
      4. Remainderman fails to make necessary capital improvements
   iv. Potential litigation – case study
   v. Is a trust a better solution?

b. Tenancy in common
   i. Basic rules
   ii. Potential problems
   iii. Partition proceeding
   iv. Possible solutions
      1. Splitting up properties among beneficiaries (i.e., separation)
      2. Tenancy in common agreement
         a. Essential provisions of a TIC agreement
      3. Limited liability company

5. Property Casualty Insurance When a Trust Owns Real Property

a. Problem
b. Possible solutions

6. Real Property Passing Under a Will or a Trust: Is It Commissionable?

a. Executor's commissions
   i. General rule
   ii. The exception: executorial functions
   iii. Special commission for collecting rent and managing real property: SCPA 2307(6)

b. Trustee commissions
   i. General rule

ii. Special commission for collecting rent and managing real property: SCPA 2309(7)

7. Real Property and the Estate Tax Return

a. Reporting the value of the property: should it be the property's gross value or value of the equity?

b. Deducting Real Property-Related Expenses on Schedule K of the Estate Tax Return: Will the IRS Allow the Deduction?

i. Deductibility of executor's commission attributable to real property

ii. Deductibility of real property taxes

iii. Deductibility of real property upkeep expenses

Deeds and Misdeeds:
Avoiding Real Property Transfer and Planning Pitfalls

New York State Bar Association, Trusts and Estates Law Section
Fall Meeting, October 18-19, 2018

Presented and Submitted By:
Albert B. Kukol
(with special thanks to Jamye Lindsey and Greg Catarella)
Levene Gouldin & Thompson, LLP
450 Plaza Drive, Vestal, NY 13850
607-763-9200
akukol@lgtlegal.com

I. Estate Planning and Real Estate - Pre-Death Issues

1. **Types of Ownership** (Estates, Powers and Trusts Law Section 6-2.2)

   a. Joint Tenants with Right of Survivorship - each tenant owns equal percentage share in the property; upon death of one tenant, deceased tenant's share passes to remaining tenants equally

   b. Tenants by the Entirety - each spouse owns the *whole* property (default disposition to a husband and wife unless declared otherwise)

   c. Sole Ownership – upon death of owner, title passes through deceased's estate.

   d. Tenants in Common (default disposition unless expressly declared a joint tenancy) - each tenant owns a certain percentage of the property; upon death of a tenant, deceased tenant's share passes through deceased tenant's estate.

   e. Life Estates and Remaindermen - discussed in detail below.

   f. Trust – title is held in the name of Trustee, as Trustee of Trust, not in name of Trust itself; discussed in detail below.

2. **Life Estate Deeds (with Special Power of Appointment Reserved)**

See sample clauses at Appendix page 17.

a. Overview

i. Common Medicaid planning tool. Potentially prevents Department of Social Services from obtaining a lien on the property, and potentially results in a shortened Medicaid "penalty period."

ii. Remainder interest is subject to grantee's Judgments, bankruptcy and possibly spouse's marital property claim for any increase in value.

iii. Grantees needs to be added as additional insured to grantor's homeowner's insurance policy.

iv. Life estate has a value, as does the remainder interest. Both values are based on life estate holder's life expectancy (age) and prevailing interest rates. (Valuation Tables: 26 USC 7520, Medicaid Reference Guide Page 353 at www.health.ny.gov/health_care/medicaid/reference/mrg/3)

b. Tax Benefits / Issues

i. Real Property Tax

A. Life Estate preserves senior citizen's, STAR and Veteran's real property tax exemptions. 9 Opinions of Counsel SBEA 41, RPTL Sec. 502 and 467; For Veteran's, RPTL §458.

B. Care is required in the wording of the Life Estate and in completing the RP-5217 to ensure the exemptions continue. Right of occupancy is not a life estate. 9 Opinions of Counsel SBEA 41.

ii. Gift Tax

A. Transfer requires the filing of a federal gift tax return for future gift of remainder interest using IRS tables and fair market value, unless special power of appointment is reserved. 26 USC 2501(a), 26 CFR 25.2511-2(b)

B. Obtain a written fair market value analysis.

C. IRC §2702 values the transfer of the remainder interest to a family member at the full value without discount for the life estate retained. The NYS Department of Taxation and Finance has concurred for transfers after October 1, 1997 that the full value will be used per IRC §2702.

iii. Income Tax (Remainder)

A. If not a principal residence of grantees, exclusion from gain on sale (IRC §121) is lost for remainder interest.

B. Use IRS table and Sec. 7520 rate to calculate the remaindermen's gross proceeds.

C. Taxable income is the net proceeds minus the tax basis. The remaindermen's basis is the donor's (carryover) basis. 26 USC 63 and 26 USC 1015(a).

iv. Income Tax (Life Estate)

A. Sale of life estate results in income, based on IRS tables to the life tenant, but IRC §121 excludes up to $250,000.00 of gain on sale of if: (1) the home was used 2 of last 5 years as principal residence or (2) the home was used 1 of last 5 years as such, and then owner of life estate resided in a nursing home (time in nursing home counts towards the 2nd year residence requirement).

B. You must use the IRS tables to compute the sale proceeds to be reported on the 1099 form. 26 USC 7520.

v. Estate Tax

A. Reserved life estate requires inclusion of full fair market value at death as part of taxable estate, resulting in stepped-up basis for grantees. 26 USC 1014, 2036

B. When life tenant dies, if possible, obtain a release of lien of estate tax from NYS for real property subject to life estate or an affidavit of no tax due. Under EPTL 2-1.14, estate can recover tax from the person receiving the property. NYS form ET-117.

C. NOTE: Federal estate taxes are liens on the property of the estate for 10 years from the date of death. 26 USC 6324(a)A(1). New York state estate taxes are liens on the property of the estate for 15 years from the date of death. NYS Tax 982.

c. Medicaid Benefits / Issues

i. For Medicaid eligibility purposes, it's a transfer of the remainder and the value of the remainder interest in the house is used to calculate a period of ineligibility. Medicaid Reference Guide Page 353

ii. Life estate value is exempt for Medicaid eligibility purposes. Medicaid Reference Guide Page 353

iii. If life estate is sold, proceeds from life estate go to life tenant, and are an available resource. The value of the life estate is determined by using IRS tables.

d. Valuation of Life Estate and Remainder Interests upon Sale of Real Property

i. You must use life estate and remainder interest tables published by the Internal Revenue Services (IRS). The IRS uses an interest rate that changes monthly based on the economy, and an actuarial table. The rate is called the Section 7520 rate. The actuarial table is called "Table S, Single Life Factors Based on Life Table 90 CM."

ii. There are many internet sources that provide both current and historical Section 7520 rates. See, e.g.: (www.leimberg.com/software/7520rate.html).

e. Rental Income

i. Net rental income, after payment of insurance, repairs, and taxes, goes to support of life tenant if life tenant is on Medicaid in Nursing Home, provided life estate language imposes burden of such expenses on the life tenant. Otherwise gross rent goes to care for life tenant.

ii. Include a clause whereby grantor pays taxes, insurance, repairs and maintenance. See Library of Official Documents at the NYS Department of Health website 96 ADM-8 at: www.health.ny.gov/health_care/medicaid/publications/

f. Mortgages

i. Transfer of house subject to a mortgage can occur without triggering a default under "due on sale clause" if grantees are protected by Garn-St. Germain Act. (12 USCA 1701j-3)

(d)(6) transfer to children or spouse

(d)(8) transfer to intervivos trust where borrower remains a beneficiary

ii. Payments made on the mortgage by the life tenant will be considered additional uncompensated transfers for Medicaid purposes.

g. Special Power of Appointment: ("SPOA")

i. Allows Grantor to *change* the life estate owner and/or the remaindermen. See sample language for exercise of SPOA, See Appendix page 18.

ii. Makes the transfer an incomplete gift for gift tax purposes.

iii. Gives grantor flexibility in case remaindermen "goes bad" or dies; also renders the transfer an "incomplete gift" for gift and estate tax purposes.

iv. Must be *specifically* relinquished by grantor in a Deed, and can only be relinquished to certain individuals. Hence the need for the "two-step" conveyance when property is being sold while life estate and SPOA holder is still alive. (First Deed: Kids purchase life estate from parent, and in this Deed, parent relinquishes SPOA to kids; Second Deed: Kids sell to third party).

v. Subsequent Sale

A. During Lifetime. SPOA must be released and terminated for property to be sold during grantor's lifetime. Certification by the grantor in the deed or an affidavit that it has not been previously exercised is required for title. Depending upon the wording of the SPOA, two deeds are required; the first will release and terminate the SPOA to the selected members of the class of grantees; the second will be from the grantees to the third party buyer.

B. After Death of SPOA holder After grantor is deceased, depending upon the wording of the SPOA, the sale may require a deed from all possible grantees, or may require probate of the Will. However, most, if not all of the time, certification language in the deed or an affidavit that the SPOA has not been exercised, will suffice. See attached sample Affidavit, at Appendix page 19.

vi. Tax Issues - See attached overview of gift tax and income tax issues involved when a SPOA is released and terminated at Appendix pages 20-22.

vii. Rule of Thumb for Sales to a Third Party When You Have a Life Tenant and Remaindermen:

A. If Deed contains a Life Use and Special Power of Appointment, prepare two Deeds (1st Deed to relinquish Life Use and Special Power of Appointment from Life Tenant to Remaindermen, and 2nd Deed from Remaindermen to Third-party Buyer.)

B. If Deed contains only a Life Use (but no Special Power of Appointment), prepare only one Deed, in which

Life Tenant and Remaindermen convey to Third-party Buyer.

C. SPECIAL RECENT NOTE: In the past several months, we are seeing these life estate deeds with special power of appointment ripen and develop into the time where a transfer of the property is occurring for some reason. Usually, it is because the life tenant needs or wants to sell the property. On several recent occasions, the family involved has desired to not simply sell the property, utilizing the "two-step" deed process above. Instead, the family desires to un-do the original transfer, and convey the property back into the name of the original grantor, who will then act as seller to the third-party buyer.

The only way to accomplish this is to prepare three separate deeds. We have confirmed this process with our title companies, and have put much blood, sweat and tears into finding some way around it. However, it does require the creation and execution of three separate deeds. (1st deed to relinquish life estate and special power of appointment from life tenant to remaindermen; 2nd deed for remaindermen to convey back to original grantor (usually their parent); and 3rd deed for original grantor to convey to new buyer.

3. **Trusts**

a. Similar to a Will; sometimes Trusts are even *part of* a Will ("testamentary trust"), although they can also be separate, stand-alone documents ("living trusts" or "inter-vivos" trusts).

b. Trust holds assets, and is managed by a "trustee".

c. Sale proceeds usually *stay in the trust* if sale is out of a living trust.

d. An alternative to a Deed to individual grantees while retaining a life estate and SPA is a transfer to a irrevocable income only trust with SPA over beneficiaries of trust, exercisable in lifetime or in a Will.

e. No life estate or SPA should be retained in the deed to the trust. The trust should expressly state that the beneficiaries have the use of the real property to preserve the real property tax exemptions (veteran's, senior citizen's, STAR). Sample trust clause for homesteads is at Appendix page 23.

f. The RP-5217 form should contain a notation that the sellers/grantors retain a life tenancy by virtue of the trust, so that the property will maintain all applicable real property tax exemptions.

g. The Trust document is rarely recorded of record. Trustee's Affidavit is used for title purposes. (see attached - Affidavit, Appendix page 24. Generally speaking, people who create trusts intend to keep the trust's terms private. Therefore, never give full copies of clients' trust agreements to opposing side.

h. If plans are to sell the house and/or other assets will go into the trust, the trust may be a better choice as grantee than individuals. If a grantee does not plan to live in the house, it may be better from an income tax viewpoint to put the house in a trust, provided that there are sufficient other resources to self-pay nursing home costs during the greater period of ineligibility that results from the transfer into the trust. The sale by the grantor trust would take advantage of the full exclusion of gain on sale of the homestead under IRC Sec. 121. A non-grantor trust would not. IRC 674(a) and 675(4).

i. Ancillary probate can be avoided by transferring one's real property which is located in a state other than one's state of residence, from himself individually to a trustee of a lifetime trust.

II. **Estate Administration and Real Estate - Post-Death Issues**

1. **Intestacy** (EPTL 4-1.1) ("died without a Will")

a. Heirs/distributees are set by statute.

b. Administration Proceeding - appointing a fiduciary to carry out the statutory distribution scheme. Use an Administrator's Deed to convey property out of estate.

c. Affidavit of Heirship and Distributees' Deed used when no estate proceeding will take place. See Affidavit, at Appendix pages 25-26.

But note: EPTL 3-3.8: The title of a purchaser of real property, in good faith and for valuable consideration, from a distributee of a person who died owning such property shall not be affected by a testamentary disposition of such property by the decedent, *unless within two years after the testator's death the will disposing of the property is admitted to probate.* This is why a distributees' deed can only be done once two years have passed since death of testator.

2. **Testacy** ("died with a Will").

a. Cast of characters:

i. Specific beneficiaries/legatees - People named in Will who will be "getting stuff" specifically set forth in Will.

ii. Specific devisees - People named in Will getting specific parcel(s) of *real property*.

iii. Residuary beneficiaries/legatees - People named in Will

who will get whatever is not specifically bequeathed or devised

b. Probate Proceeding: Purpose is for proving the Will and appointing a fiduciary to carry out its distribution scheme.

i. Probate = "prove" the Will by making sure those (heirs/distributees) that would profit if the Will were fraudulent either consent to its probate or have received notice of its probate.

ii. Not all of a decedent's property passes through his or her Will:

1. Property is jointly owned with right of survivorship;

2. Property is jointly owned via tenants by the entirety;

3. Property passes to remaindermen by way of Deed's terms (life estate deed);

4. Property is titled in the name of a Trust.

iii. Use an Executor's Deed to convey property from estate.

3. **Specific Devises of Real Property (via Will)**

a. Statutory (EPTL 11-1.1) Powers of Fiduciary/personal representative

No power over property "specifically disposed of" (EPTL 11-1.1(B) (5)). This means the executor cannot sell property that has been specifically devised, absent an Order from the Surrogate's Court.

b. What is a "specific devise"?

i. Specific property devised to specific person or people eg. "I give, devise & bequeath 13 Devil's Highway, Hades, New York to my sister, Morticia Addams". The Will can serve as a "deed" if probated. Hence its occasional recording in the Clerk's Office to bootstrap devise in Surrogate's Court. NY EPTL Sec. 1-2.17. Why does mere probate suffice to "convey" title of a specific devise without a recorded deed? The Executor has no power of sale, nor does he earn commissions on specifically devised property. SCPA 2307(2). But many tax assessors like to see a deed and the RP-5217 before they will recognize title has changed.

ii. Compare to residuary clause of "all the rest, residue and remainder I leave to Uncle Fester" (Executor's Deed needed to convey to Uncle Fester *unless* property is being sold by estate to a third party).

iii. Compare to a devise of "all my real property to my Butler, Lerch. This is a specific devise for *estate* purposes, but not specific enough for *real estate* (chain of title) purposes. (Executor's Deed needed from executor to Lerch)

iv. To avoid confusion - use the terms "specific devisee" or "residuary beneficiary". Confusion results from use of the terms “devisee" and beneficiary". A "devisee" is a "beneficiary" who receives real property. Hence the confusion.

4. Rights and Responsibilities of a <u>Distributee Co-tenant</u>

a. If there are issue and no spouse, the decedent's estate will be distributed to the issue by representation (EPTL § 4-1.1[a][3]). Moreover, "title to all real property of a decedent which is not disposed of by will, vests immediately in the distributees entitled to take under the statute" and the "distributees take title as tenants in common" (*In re Estate of Fry*, 28 Misc 2d 949, 950 [Sur Ct, Suffolk County 1961]). In addition, a brother and sister inherited real property as tenants in common when their mother died intestate (*Ricci v Perrino*, 285 AD 502, 503 [3d Dep't 1955]). Furthermore, upon the death of a father with four children that died intestate, the four children took title to the real property as tenants in common (*In re Estate of Jemzura*, 65 AD2d 656, 657 [3d Dep't 1978], aff’d 52 NY2d 1067 (1981)).

b. Does a co-tenant in common along with his other surviving siblings, have a right to occupy the real property and not pay rent to the other co-tenants?

i. The general rule is that "a tenant in common cannot be successfully sued for rent by a cotenant" (*In re Limberg*, 281 NY 463, 465 [1939]). However, if "there is an ouster, or acts amounting to a denial of the rights of cotenants, the tenant in possession may be charged with rental" (*In re Limberg*, 281 NY at 465). Furthermore, "the occupancy by one of several tenants in common of an estate of itself does not make the occupant liable to the cotenant for rent of the premises or for use and occupation so long as he does not exclude the other co-tenants from the exercise of similar rights" (*Jemzura v Jemzura*, 36 NY2d 496, 503 [1975]).

c. Is there any authority that the Administrator of the estate should still pay the taxes on the real property even if the real property was owned by the siblings as distributee co-tenants?

i. No, there is not authority that indicates that the estate should pay the property taxes when the property is owned by several co-tenants.

d. Are all the co-tenants obligated to pay the taxes, even though only one of them is occupying the real property?

i. According to Real Property Actions and Proceedings Law Section 541, "the occupancy of real property by one of several tenants in common is deemed to be the possession of the others" (*Melomo v Tax Appeals Tribunal*, 195 AD2d 803, 804 [3d Dep't 1993]; see RPAPL § 541). Moreover, while a tenant cannot force the other co-tenants to contribute to the cost of improvements, the other co-tenants are subject to the preservation of the common property, such as the cost of preserving the title, purchasing an outstanding title, and paying taxes ". Such costs will be apportioned among the several tenants, although it [may be] borne in the first instance by one" (*Clute v Clute*, 197 NY 439, 447 [1910]; see Ricci, 285 AD at 505). Also, see Klein v Dooley, 120 AD3d 1306 (2nd Dept. 2014) where non-occupying co-tenants had to reimburse the occupyin co-tenant for the costs of the upkeep of the property, including taxes, insurance and maintenace.

5. **Marketable Title Issues** ("reasonable freedom from litigation")

a. Chain of Title

b. Encumbrances

i. Restrictions contained in Wills:

1. Life use reservations
2. Splitting off of oil gas and mineral rights
3. Rights of First Refusal

ii. Liens: Judgments, Mortgages, Taxes

1. Estate tax is an automatic New York State lien for 15 years (NY Tax 982) from date of death on taxable estates. The lien occurs automatically, without any

documentary filing; a title search will not result in a lien being discovered.

2. Taxable Estates are those having a value of:

A) 4/1/2017 - 12/31/2018 - over $5,250,000 (after that, same as Federal exemption amount - or maybe not; stay tuned....)
B) 4/1/2016 - 3/31/2017 over $4,187,500
C) 4/1/2015 - 3/31/2016 over $3,125,000
D) Over $2,062,500 as of April 1, 2014
E) Over $1,000,000 as of January 1, 2002
F) Over $675,000 as of February 1, 2000
G) Over $300,000 as of October 1, 1998
H) Over $115,000 before then; and $108,000 before then.

iii. Release of Lien of Estate Tax (Tax Law 975(f)) (discussed below)

A) Affidavit of no tax due because of marital deduction or small taxable estate. See Appendix page 27.

B) NY Tax Law Section 975: If estate tax was due and not paid, recipient of property is personally liable for the tax, unless they were a bona fide purchaser.

c. Abstract of Title Issues

i. Estate specification in abstract: Key issues to look for:

A) Was property specifically devised?

B) Were all distributees served with Citation or did they otherwise file waivers and consents?

C) Is there a Court Order interpreting the Will?

D) Restrictions on transfer of property in Will.

ii. Be sure that there were searches of both the clerk's office and Surrogate's Court.

iii. How do you prove death?

A). Joint tenant, tenants by entirety, life estate: Get a Death Certificate from town where body was or death occurred. Death Certificate will also be in Surrogate's Court if estate proceeding was held.

B) Individually or tenant in common: Estate Proceeding or Affidavit of Heirship if no estate proceeding occurred

C) Death referenced in a recorded Deed that was recorded at least ten years ago is presumptive evidence of heirship or survivorship. RPAPL 341

6. **Miscellaneous Issues**

a. Is there ever a need to record a Will in Clerk's Office? (One does need to *probate* the Will, to avoid objections as to its validity).

b. Should you have a Deed executed from the Executor to:

i. Specific devisees? Technically, no, but often done anyway to satisfy Tax Assessor.

ii. Residuary devisees? Yes, unless sold to 3rd party.

iii. A third party buyer? Yes.

c. Should you have a deed executed by the Administrator to:

i. A third party buyer? Yes.

ii. The heirs/distributees? Yes.

d. When and for how long do you search:

i. Specific devisees? Date of decedent's death to recording date of transfer out by devisee.

ii. Heirs/distributees? Search the Administrator and the distributees from date of decedent's death to the recording date of transfer out by the Administrator or distributees.

iii. Residuary devisees? Date of Executor's Deed to residuary devisees to date of recording of Deed out from devisees.

iv. Fiduciary/personal representatives? Date of appointment of fiduciary to recording date of Deed conveying property out.

v. Decedent? Date of Deed in to recording date of conveyance out (in case liens were recorded after death).

e. Release of Lien of Estate Tax

i. When is it needed? When deceased owner was in the title individually or a tenant in common or joint tenant. It is not needed for the first tenant by entirety to pass.

ii. How to obtain it? See NYS tax form ET-30.

APPENDIX TO MATERIALS SUBMITTED

BY

Albert B. Kukol

Life Estate and Special Power of Appointment Clauses

<u>One Grantor</u>

The Grantor reserves a life estate in the premises, including the right to its possession, control, enjoyment, use and occupancy during the Grantor's lifetime, with the Grantor to pay for all maintenance and repairs, water and sewer charges, insurance charges, and taxes relating to the premises.

The Grantor reserves the power to appoint the remainder and/or Grantor's life estate in the premises to any one or more of the issue of the Grantor, siblings of the Grantor, or issue of the Grantor's siblings, or the spouses or surviving spouses of any of the foregoing persons, with the term "issue" being deemed to include persons who have been adopted according to law or born out of wedlock. This power shall be exercisable or may be relinquished during the Grantor's lifetime by a deed executed to the Grantee(s) herein or to others who are members of the class of appointees set forth herein, making express reference to this power and recorded in the County Clerk's Office where this deed is recorded, prior to the Grantor's death. This power shall not be exercisable by a Will. No exercise of this power shall be deemed to release the Grantor's life estate unless such a release is explicitly made in a deed. The exercise of this power shall not exhaust it, and unless the power is specifically released in such a deed, the deed recorded last shall control as to any ambiguities or inconsistencies.

Two Grantors

The Grantors reserve a life estate in the premises, including the right to its possession, control, enjoyment, use and occupancy during the Grantor's lifetimes, with the Grantors to pay for all maintenance and repairs, water and sewer charges, insurance charges, and taxes relating to the premises.

The Grantors and the survivor of them, reserve the power to appoint the remainder and/or the Grantors' life estates in the premises to any one or more of the issue of the Grantors, siblings of the Grantors, or issue of either one of the Grantors' siblings, or the spouses or surviving spouses of any of the foregoing persons, with the term "issue" being deemed to include persons who have been adopted according to law or born out of wedlock. This power shall be exercisable or may be relinquished during either of the Grantors' lifetimes by a deed executed to the Grantee(s) herein or to others who are members of the class of appointees set forth herein, making express reference to this power and recorded in the County Clerk's Office where this deed is recorded, prior to such Grantor's death. This power shall not be exercisable by a Will. No exercise of this power shall be deemed to release either of the life estates created herein unless such a release is explicitly made in a deed. The exercise of this power shall not exhaust it, and unless the power is specifically released in such a deed, the deed recorded last shall control as to any ambiguities or inconsistencies. While both Grantors are living, the exercise or release of the power shall require both Grantors to join.

Sample language to exercise an SPA:

After the being clause insert the following paragraph:

This deed exercises a certain special power to appoint the remainder interest in the premises conveyed hereby, which power was reserved by the Grantors herein in the

aforesaid Deed dated and recorded on in the County Clerk's Office in Book of Deeds at page . By this exercise of said special power in this deed, the Grantors herein are divesting said of his/her previously granted remainder interest so that said has no right, title or interest in the premises. This exercise of said special power does not exhaust it and does not release it.

[Then repeat the standard SPA clause.]

AFFIDAVIT CONCERNING SPECIAL POWER OF APPOINTMENT

STATE OF NEW YORK)
)ss.:

COUNTY OF BROOME)

The undersigned, being duly sworn, deposes and says:

1. I am a child of ("Parent"), the life tenant(s) of premises located at.

2. Parent reserved said life tenancy and a special power of appointment ("SPA") in a deed dated and recorded in the County Clerk's Office on in Book of Deeds at page .

3. Parent did not exercise the SPA during Parent's lifetime or in a Will.

STATE OF NEW YORK)
) ss:
COUNTY OF)

On the day of in the year 2018, before me, the undersigned, personally appeared, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

_____
Notary Public

RELEASE AND TERMINATION OF SPA - TAX ISSUES

1. Gift Tax

The release and termination of the SPA by mom and pop to the kids "completes" the gift and requires the filing of a gift tax return for the full fair

market value (sales price of the property). The amount of the gift will be reduced by any consideration paid by the kids to mom and pop.

2. Income Tax

(A) Form 1099S or principle residence certification

1. Mom and pop sell the life estate to the kids.

i. Assuming mom and pop live at the property two (2) of the last five (5) years (or one of the last five (5) if they moved into a nursing home), the property was therefore their principle residence, and they can sign the principle residence certification and be exempt from form 1099-S reporting and exempt from any income tax.

2. Kids sell the property to the third party buyer.

i. The kids purchase the life estate from mom and pop simultaneously with the sale to the third party buyer.

ii. At the closing mom and pop get a check for their life estate that the kids purchased from them. Also at the closing the kids, although they sold the entire fee interest to the third party buyer, get a check for the value for the remainder interest because they had to pay mom and pop for the just purchased life estate.

iii. The kids need to sign Form 1099-S. Assuming none of the kids lived at the property they cannot sign a principle residence certification. Each kid signs a form 1099-S for his or her proportionate share of the full sale price, because the kids sold the entire fee interest.

(B) Example: Mom and Pop with 2 Kids. The house was purchase for $20,000 and $10,000 of improvements were made over the years (furnace, roof, additions, renovations)

Full Fair Market Value	$100,000
Less Adjustments and Closing Costs	-10,000
Net Proceeds	$ 90,000

Amount of checks at the closing:

Mom and Pop for life estate (33% interest per calculation)	$ 30,000
Balance split between two (2) kids $ 60,000 divided by 2	
Amount per each kid	$ 30,000

AT CLOSING
Mom and pop sign a principle residence certification
Kids sign form 1099-S for gross proceeds. Each 1099-S shows $50,000 because the kids sold the entire fee interest.

POST CLOSING (GIFT TAX)
Mom and pop file gift tax returns for a $50,000 gift to each kid, less sale of life estate of $15,000 for a total gift of $35,000.

POST CLOSING (INCOME TAX)
Mom and pop have no income tax or reporting on the transaction.

Each kid reports the following on Schedule D of form 1040 (Individual Income Tax):

Gross Proceeds of each kid per 1099-S			$50,000
Calculate Total Tax Basis :			
Purchase Price	20,000		
Improvements	10,000		
Closing Costs	9,000		
Total Adjusted Tax Cost Basis	$39,000		
Total Adjusted Tax Cost Basis is then apportioned 1/3 to mom and pop for life estate ($13,000) and 2/3 to kids for remainder		$26,000	
Add consideration the kids paid for life estate		30,000	
Kids' Total Adjusted Tax Cost Basis		$56,000	
Split ½ each between the two kids and subtracted from the Gross Proceeds		$28,000	-28,000
EACH KID'S TAXABLE GAIN			$22,000

Note that the above example would change if one of the parents predeceased the transaction and the property received a full or partial "stepped up basis" at death. A full stepped up basis occurs only if the deceased spouse was the one who purchased the house solely with his or her own money prior to 1/1/77 (Gallenstein 92-2 USTC 60,114, IRC 2040(b)). In that event the entire property would get a full

stepped up basis at the time of death. If the decedent spouse did not pay the entire purchase price for the house from his or her own money or if the purchase was made on or after 1/1/77, the house would receive a stepped up basis for one half (½) its value on date of death of the first spouse to die.

Trust Clauses for Trusts Holding the Homestead

One Grantor

RESIDENTIAL REAL ESTATE. In the event that this Trust holds residential real property used by the Grantor, then the Grantor shall have the exclusive use and occupancy of the said real property (including a cooperative apartment) for

residential purposes. If the Grantor ceases to use such property as a residence (permanent or seasonally) the Trustee may, in the exercise of absolute discretion, either continue to hold such property as an investment or sell it. Notwithstanding the foregoing, any purchaser of real property owned by this Trust will be entitled to rely upon the authority of the Trustee to sell such real property. Upon the request of the Grantor, the Trustee shall purchase substitute property or properties to be used for dwelling purposes of the Grantor. Such substitutive property purchased shall be part of the principal of this Trust. Grantor shall not be required to pay rent for such property, but shall remain responsible for and required to pay all of the expenses for the maintenance of the property, including taxes, insurance, utilities, mortgage payments and normal cost of maintenance and upkeep.

Two Grantors

RESIDENTIAL REAL ESTATE. In the event that this Trust holds residential real property used by the Grantors, or the survivor of them, then the Grantors, or the survivor of them, shall have the exclusive use and occupancy of the said real property (including a cooperative apartment) for residential purposes. If the Grantors, or the survivor of them, cease to use such property as a residence (permanent or seasonally) the Trustee may, in the exercise of absolute discretion, either continue to hold such property as an investment or sell it. Notwithstanding the foregoing, any purchaser of real property owned by this Trust will be entitled to rely upon the authority of the Trustee to sell such real property. Upon the request of the Grantors, or the survivor of them, the Trustee shall purchase substitute property or properties to be used for the dwelling purposes of the Grantors, or the survivor of them. Such substitutive property purchased shall be part of the principal of this Trust. Neither Grantor shall be required to pay rent for such property, but shall remain responsible for and required to pay all of the expenses for the maintenance of the property, including taxes, insurance, utilities, mortgage payments and normal costs of maintenance and upkeep.

TRUST AFFIDAVIT

In the Matter of

AFFIDAVIT OF

STATE OF NEW YORK)
) ss.:
COUNTY OF BROOME)

The undersigned,, being duly sworn, deposes and says:

1. On, the undersigned created a trust entitled "" ("Trust").

2. The Trust has not been amended or revoked and it remains in full force and effect.

3. Under the provisions of the Trust, the Trustee has the power to purchase, sell and convey real estate and to encumber the same by mortgage, pledge or otherwise.

4. The Trustee of the Trust has not changed since the creation of the Trust.

5 A full and complete copy of the Trust is available for inspection during regular business hours at the law offices of Levene, Gouldin & Thompson, LLP, P.O. Box F-1706, Binghamton, New York 13902.

_____

STATE OF NEW YORK)
) ss:
COUNTY OF)

On the day of in the year 2018, before me, the undersigned, personally appeared , personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

_____
Notary Public

In the Matter of the Heirs
of **AFFIDAVIT OF**

STATE OF NEW YORK)
) ss.:
COUNTY OF BROOME)

The undersigned, being duly sworn, deposes and states:

1. I reside at.

2. I make this affidavit to clarify the chain of title to premises commonly known as, County of Broome, State of New York (tax map #) ("Premises").

3. The Premises were formerly owned by by deed from [Deceased rec'd property from whom] dated and recorded in the Broome County Clerk's Office in Book of Deeds at Page.

4. was my parent ("Parent").

5. Parent died on.

6. Parent was a resident of the State of at the time of death.

7. Parent was unmarried at the time of death.

8. At the time of death, Parent's sole heirs at law were (collectively, the "Distributees").

9. All of the Distributees are of full age and sound mind.

10. No Will was offered for probate of Parent's estate and no estate proceeding of any type occurred for Parent's estate in the State of New York or in the State of.

11. As a result of the foregoing, the Premises passed to the Distributees, each with a % undivided interest as tenants in common.

12. My use and possession of the Premises as a tenant in common have been peaceable and undisturbed, and my interest and title have never been disputed, questioned or rejected, as far as I know; I know of no facts by reason of which said use, possession, interest or title might be called in question, or by reason of which any claim to any part of the Premises or any interest therein adverse to me might be set up.

13. To the best of my knowledge, the interest, title, use and possession of the Premises by my co-tenant(s) have also never been disputed or questioned.

_____

STATE OF NEW YORK)
) ss:
COUNTY OF)

On the day of in the year 2018, before me, the undersigned, personally appeared, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

_____
Notary Public

RECORD & RETURN TO:

AFFIDAVIT CONCERNING
NO ESTATE-TAX DUE UPON DEATH OF

STATE OF NEW YORK)
) ss.:
COUNTY OF BROOME)

I, _____, being duly sworn, depose and state:

1. I am a child of the deceased, _____ ("Decedent"), who died a resident of Broome County, New York, on _____.

2. I was familiar with the financial affairs of the Decedent.

3. At the time of Decedent's death, no Last Will and Testament was offered for probate with the Broome County Surrogate's Court and no estate tax filing was ever made with New York State.

4. At the time of Decedent's death, he/she was survived by his/her spouse, who was an American citizen.

5. Upon information and belief, with the exception of some minor personal property of nominal value, all of the assets owned by the Decedent at the time of his/her death were jointly held with his/her surviving spouse, or named such spouse as beneficiary.

6. Upon information and belief, the total value of the assets of the Decedent on the date of his/her death was less than $5,250,000.00.

7. As a result of the foregoing, no Will was probated for the Decedent's estate and no New York estate tax was due for the Decedent's estate.

Subscribed and sworn to before
me this day of , .

_____
Notary Public

Keeping the "Heirloom" Property in the Family

Timothy Borchers, Esq.
Borchers Trust Law
Medway, MA
Christopher A. Cahill
Twelve Points Wealth Management
Concord, MA

SECOND HOME AND HEIRLOOM PROPERTY PLANNING

Are your Clients' Days at the Beach Numbered? Or will the Property Survive to the Next Generation?

Planning considerations, techniques, documents and marketing in this practice segment

Timothy B. Borchers *is a partner in the Greater Boston firm of Borchers Trust Group, P.C. and the creator of the Inheritance Trust™ and other trademarked estate planning and settlement techniques, including the Heirloom Ownership Trust™. He practices in the fields of estate and tax planning, real estate, asset protection, trust and estate settlement, and serves in trustee capacities. Tim holds the Estate Planning Law Specialist™* and Accredited Estate Planner®** (EPLS™, AEP®) designations. He is the creator of the Heirloom Ownership Trust™ tool kit for attorneys and a co-creator of www.SecondHomeSavvy.com. He speaks frequently on the topic of second home succession planning and teaches estate planning for bar, CPA and trade organizations. He was awarded the Going Green Award by the Massachusetts Bar Association for innovation in "greening" the practice of law. He is licensed in Massachusetts and New Hampshire, a member of WealthCounsel™ LLC, and has twice been president of the Massachusetts Forum of Estate Planning Attorneys. Tim earned his law degree from Boston College School of Law, where he was Case Editor of the UCC Reporter Digest, and his undergrad from Bowdoin College,* summa cum laude*, and is an accomplished classical tenor. Tim grew up spending summer weeks at Sandy Pond near Pulaski, NY. He and his wife Ruth started their own tradition on Lake Winnipesauke in NH. Reach him at tim@borcherslaw.com. (*Certified by the Estate Law Specialist Board, Inc., an American Bar Association-accredited certification. **Accredited by the National Association of Estate Planners & Councils.)*

Christopher A. Cahill *is a Partner in Twelve Points Wealth Management in Concord, Mass. and Principal of the Twelve Points Family Office division, which provides concierge services for high net worth individuals. He has a concentration in financial plans for lawyers and law firms. Prior to financial services, Chris practiced in the field of estate planning. Chris is a lawyer, Certified Financial Planner® (CFP®), and a Chartered Advisor in Philanthropy® who has spent over 20 years helping wealthy families develop and implement complex and coordinated estate, financial and philanthropic plans. He holds a degree in Finance and Management from Northeastern University and a J.D. from Massachusetts School of Law. Chris is a co-creator of www.SecondHomeSavvy.com and can be reached at Chis@twelvepointswealth.com.*

1. WHAT IS AN *HEIRLOOM* PROPERTY?

   A property worth protecting and passing down

   a. You know it when you *experience* it

      Everyone from grandpa to youngest grandchild says, "I love this place and I want to keep coming here as long as I live, and I hope the same for my kids." Your client says, "It's going to be hard for my kids to afford a second home of their own. I want them to continue to enjoy the place and keep coming back. It'll be good for them to get together here."

   b. Your heirs know it when they *inherit* it

      The children inherit, and there is consensus, "This is a great place, let's keep a good thing going."

   c. The market will *suggest* it

      The market for the property is strong, and you can't even imagine letting it go. The house is in a great location. It is easy to rent, and the rental income is good. You don't necessarily love the place, and it's also expensive to maintain and a lot of responsibility.

2. THE PROBLEM WITH REAL ESTATE CO-OWNERSHIP GENERALLY

   a. Co-ownership cases.

      i. Co-owning with *anyone* is difficult. Just the everyday matters of co-management and ownership are enough to call out for business arrangements or trust agreements.

      ii. Business partners, siblings, friends, unmarried partners, and engaged couples often get together to buy a home or investment property. We've watched many of these parties split, lose interest, or fail to do their part in these arrangements. Divorces and bankruptcies force sales and petitions to partition.

      iii. Parents co-signing for loans and parents providing "gifts" (often implied loans) of equity, then not being able to recover their investment when the child fails to pay back the loan, or divorces or files for bankruptcy.

   b. Co-ownership agreements can help.

      I started drafting co-ownership agreements early in my practice. I developed a brief co-ownership "checklist agreement" to try to make this frequent occurrence work out. I

have not heard back from the parties who used my agreements – I assume it worked out for them.

3. WHAT IS UNIQUE ABOUT THE HEIRLOOM PROPERTY THAT CRIES OUT TO BE ADDRESSED?

a. As a general principal, any asset worth keeping is one worth planning for. Without planning for an asset, be it an income property, a business, a law practice, or a 1967 Corvette Stingray, there will be uncertainty among heirs about what to do with the thing, and a concomitant struggle over what to do next. The heirloom home is a prime case for the application of this principal. Simply leaving the asset equally to one or more heirs virtually guarantees conflict. To do so results in the heirs taking title together as tenants in common where it is subject to petition to partition or sale. (N.Y. Real Prop. Acts. Action for Partition §901, et seq.)

b. Even leaving the home in trust or an LLC without further instructions is almost always a recipe for disaster for the future of the home and the family relationships it is supposed to foster. We've had under-funded trusts with poorly timed distributions, and LLPs with perpetual existence that, the way they are written, will never terminate without a supermajority vote.

c. *Getting along* in managing the property, *how* to use it, to *whom* it can be left, and how to *pay* for it, and *when* to end it, are substantial hurdles to a successful inheritance.

d. I've had a lot of second home and heirloom property experiences with clients. Here are a few:

i. **"I leave the farm to my daughters."** Among the first of my heirloom property experiences involved an older couple who left their **suburban farm** to two daughters. I was new enough as an attorney that it did not occur to me to warn them that, given that one daughter lived there with them and loved the place, and wanted to continue keeping animals there, the other child was going to find this unacceptable. I may have assumed that the one occupying would buy the other out, or the one not living there would bide her time until the occupant was ready to sell. More likely I trusted what I perceived as the wisdom of my clients - if they wanted to leave it in equal shares without further instructions, they must know what they are doing! The property increased in value several

fold. Eventually the reckoning came. It was messy and took major creativity after the fact to work it out. Fortunately, I had people of good will to work with – but we know that is not always the case.

ii. **"I give the beach house to my children in equal shares." -** The four siblings inherit, but after a few years one realizes he is using the property very little and another needs the money tied up in the property. These two both want out. There's another sibling who is just an impossible partner (probably mental illness), and other who wants nothing to change from when mom and dad were alive. This perfect storm of contradictions has happened more than once in my experience.

iii. **"But Dad/Mom said we're supposed to keep it!"** – Here, the kids blame (or credit) the parents for the keep-the-home attitude. Parents didn't actually say "Keep it" and they did not leave any instructions for how to co-own it. What the children who want to keep the home often really mean is, "You can't make us sell it! *We're* not done enjoying it," usually all to themselves, while the remaining siblings don't have any use for it and want to sell. Then, they can't come to terms on a buy-out.

iv. **"I shouldn't have to pay to use my own property,"** say the cousins whose trust from grandparents still has years to go but now the trust has run out of money. They are unable to agree on anything, least of all how to pay for the property. Agreement can't be reached on when to end the relationship and some are willing to let the property decline until the trust runs its course.

v. **"List any interests you have in real estate,"** says the financial aid form for the disabled child who has to declare her interest in the inherited second home as an asset to be "spent down" before being able to keep her benefits. In one case, the disabled child actually found a realtor willing to list her 1/5 interest for sale. Even more surprising, someone made an offer!

vi. **"We don't want to be part of this anymore."** The family who has a series of contentious and expensive buyouts of family members until two are left.

vii. **"I have to sell. My husband and I are filing bankruptcy."** "Not now!" is the answer. "We can't afford to buy you out at full price." It will be up to the Bankruptcy Trustee or the Court.

viii. **"My husband and I are divorcing.** If we don't sell, I have to give him our house to balance it out."

ix. **"I want to leave my share to my wife."** Ok, but when she remarries… what then? "That's ok, she'll leave it to our kids, *I'm sure*."

x. **"I want to get out of the property in an LLP now that my parents have died. Can I petition to partition?"** Love to help with that but your parents put the property in a perpetual existence LLP that under state law cannot be partitioned. You are at the mercy of the majority of your siblings.

xi. **"My wife and I went into partnership with another couple. They have since divorced, and we don't even know where one of them is. We have been paying all the bills.** Petition to partition was the only means of dealing with this big problem.

xii. **"My granddaughter is the only one who can afford my home. How can I leave it to her and not cheat my kids out of their inheritance?** It turns out, she is willing to start buying it now

e. There is serious lack of appreciation in most clients just how difficult it will be for children to continue to run and later extricate themselves from the property. "My kids are smart. They'll figure it out," is a common refrain. Family consensus, meetings and cooperation sound good, but in practice are very difficult to achieve. Find a tactful way to debunk this theory and don't let the parents stop their planning there.

f. The expense of retaining many properties makes it difficult to keep going. While Mom and Dad paid, it was fine.

g. Occasionally a client can successfully choose one or two children to leave the property to. This approach probably out to be adopted more often but it is rarely used.

h. It is often better to require that the property be sold unless there is unanimous agreement to keep it, funding is set aside, and there are agreed terms for owning and duration.

i. A good fit for the family might be a durational devise. Say the property is left to the children, in trust, for 10 years after the death of the parents. The folks should put aside 10 years of funding to go along with it.

4. MY OWN EXPERIENCE

My own personal knowledge is based on my childhood and on my wife's and experience:

a. My mother's family's lakefront family properties north of Syracuse near Pulaski, New York where we went every summer as kids in the 1950s, 60s and 70s. These were basic summer cottages with running (lake) water, artesian wells, basic electricity, and few amenities. These were deeded to my mother's brother, apparently to keep them from having to be sold to pay for nursing home care in the 70s and 80s. The cousins who later inherited let one of the houses stay empty for decades, and the status of the other is uncertain while one cousin lives there full-time.

b. My father had his version of camp - a very rustic former logging camp deep in the NH woods, complete with buck stove for heat and cast-iron cook stove. This property of 90 acres was mostly used by Boy Scouts (certainly not for vacation). This camp was sold during his lifetime and that kept us children from having to deal with it. (To which I say, "Good move, Dad!")

c. My wife's and my home on Lake Winnipesaukee, New Hampshire. We generated enough memories to fill a lifetime in this little house. Unfortunately, we outgrew it after 20 years (who knew we'd have 8 kids in the beginning?). No heirloom there! We sold to help pay for college educations and now contemplate building another home.

5. HOW CAN WE FULFILL THE DREAM OF THE HEIRLOOM PROPERTY?

a. Plan by beginning with the end in mind: **What would this experience look like to be successful?** Maybe hold a family meeting, send out a questionnaire. Maybe not – it may be better to decide the matter without democratic participation which can be very difficult to work through.

b. Ask Mom and Dad the tough questions: "Who, what, when, how, why?" concerning the family and the future of the property.

c. Encourage Mom and Dad to lay down the law, without or without input from the heirs. Don't leave the future of the property entirely, even substantially, to the heirs.

6. WHAT LEGAL STRUCTURES AND STRATEGIES ARE USEFUL TO HELP CLIENTS PASS DOWN THEIR VACATION PROPERTIES SUCCESSFULLY?

a. Trusts make for an easy succession.

i. Dad or mom's trust can make a convenient vessel for the second home. This allows for easy coordination with the rest of the estate plan. Control is vested in the hands of one or more trustees chosen by mom and dad. It is easy to require funds be set aside to support the property for a period of post-death management through pre-selected trustees. There are no filing fees each year.

ii. Revocable trusts offer a structure for probate avoidance, estate tax sheltering.

iii. Requiring more intentionality, irrevocable trusts offer the opportunity for lifetime gifting (a Crummey-powered gift trust or zeroed-out Qualified Personal Residence Trust), valuation freezes, marital deduction and remarriage protection, creditor protection and possible nursing home protection.

iv. Other issues in drafting and funding

A. Beware – discretionary small-trust termination clauses. Observe the discretion on the part of the trustee and whether a state law provision allowing a petition to terminate could doom your project. Allow for premature terminations to provide that distributions out of the trust would be to tenants in common who would also be required to be subject to the heirloom property agreement terms.

B. Beware the state Medicaid regulations and legal strategies if the irrevocable trust is intended to protect the home from nursing home spend down.

C. Beware some states will regard the transfer to a living trust a taxable event. Also get guidance on the provincial and federal tax systems in Canada where the transfer to a trust starts a tax clock, such that after 20 years there is an imputed capital gains tax.

D. Beware any applicable statute of limitations on the length of the trust (perpetuities, lives in being plus 21 years, or other more modern adaptations, if any)

E. Beware the potential loss of title insurance coverage. Identify whether there is title insurance and obtain an endorsement when possible, even if you think the policy (like most 2006 and after ALTA policies provide – the insured includes the trust "for estate planning purposes").

F. Beware the potential loss of property and liability insurance coverage with the transfer of the property to a trust or other entity. Add the trust or entity as a named insured and all the owners as additional insured – or however best your insurance agent recommends in your jurisdiction.

v. At the end of the trust term, the property can be required to be sold with or without the ability of members to purchase at a discount. Family members can continue the condition that they have a written agreement drawn by an attorney.

b. In most states, an LLC is a practical means of holding title and organizing the succession.

i. This may be preferable to a trust, either from the get-go, at the point of inheritance, or at any time thereafter. In many states, the filing fee and annual fees pose little barrier to this form of ownership. In other states, the prospect of decades of paying for this privilege may be unappealing.

ii. LLCs typically have transferable shares, limited only by the terms of an operating agreement. The agreement can allow for transfers among owners, to descendants, and to trusts for spouses, either "at-will" or with the approval of the members or managers.

iii. LLCs offer "inside" and "outside" liability protection, which is attractive to ward off personal liability of the owners from accidents on the property and from creditors and predators of the owners with the potential for liability elsewhere in their lives.

iv. Provisions should be set forth for management and succession. My preference is for a predetermined term for the entity.

v. Beware that an LLC interest is *personal property*. This could have unintended consequences.

A. If the donor's domicile state has an estate tax, a second home *not* in that state *might* be excluded because it is *real estate* in another state. But the domicile state might include the asset as personal property if it is in an LLC.

B. But, a home in a state, like Massachusetts, that taxes *non*resident decedents on real estate, can be omitted if the home is turned into personal property, such as an LLC interest.

c. Tenancies in common with TIC agreements and Nominee "realty" Trusts with written ownership or beneficiary agreements are also useful. In some states there are prohibitions on nominee trusts holding bank accounts, presumably because they are not considered true trusts but mere agency relationships, but that is easily circumvented.

d. The written terms that accompany any of the forms of ownership can take several forms.

i. Parents (the current generation of owners) to spell out the terms and impose them on the family through a trust, or by signed agreement. I call this an *heirloom ownership agreement*.

ii. Parents require, as a condition of inheritance, that the heirs come to an agreement within a certain time frame after death, or the property must be sold. I call this an *heirloom covenant*.

iii. Parents provide limited organization terms, a trustee in charge, and funding for a limited period following death, like 5, 10 or 15 years. If the family wants to continue beyond the limited term, then they must come to terms, like required under the *covenant.*

Multiple trusts can be co-owners, or combinations of individuals, trusts and legal entities.

e. Arguably, if there is to be only a short period of co-ownership, no formal agreement may be required. But even for periods of 2 to 10 years, at the very least these recommendations should be followed:

i. Funding – enough money to cover the likely costs or net cost of running the property should be required to be set aside.

ii. Leadership – a trustee should be appointed ahead of time to manage the property and relationships.

iii. A clear ending point and consequences (like legal fees for a partition assessed to the non-cooperating parties) if there is a holdover. Extensions only with unanimous agreement or a buyout of the minority interests.

f. Other forms

i. While some old family corporations exist, like my friend's 100-year old arrangement with shares held among second and third cousins, these are rare.

ii. Trust under a will, in a deed, or a recorded covenant: these are all awkward and should be avoided. A recorded covenant may also be governed by statute and will expire, for example, after 30 years unless extended.

g. The typical LLC statute makes it easy to organize and govern. I suggest that the life of the organization be limited to between 25 and 50 years. To have the entity go longer will mean that it may be until the third generation that members can liquidate and call it a day. That is simply too long for most of family situations.

h. If the LLC is to be member-run, then the shorter the term the better.

i. Longer term LLCs should be manager-run with a succession of managers planned, if there is a clear set of leaders. When there is not, then elections must be held. Often parents would do well to require professional bookkeeping and other managerial oversight at the slightest sign of disorganized children being in charge.

j. Governance

i. Voting can be by majority, supermajority or plurality. You might like to try limiting the voting and control to the first generation while there are at least two members living and competent. Voting members can be individuals or their trustees. Independent trustees of spendthrift trusts that hold inherited interests might have a vote, but the primary beneficiaries of such trusts might be entitled to participate in meetings and allowed to be office holders or managers.

ii. Managers /trustees can be permitted to make decisions and commit the use of funds, up to an annual and per project limit (barring emergencies) or have unlimited authority

7. HOW CAN CLIENTS IMPOSE TERMS ON THEIR HEIRS? WHAT ARE THE ESSENTIAL TERMS OF AN HEIRLOOM COVENANT?

a. As mentioned, the terms can be imposed by will or trust. A provision in the residuary clause of the trust or will would contain "provisions for my home on Lake Woebegone," for example.
b. The terms can be imposed by an LLC operating agreement, or an agreement of owners /members or /beneficiaries.
c. I encourage the inclusion of at least 6 elements in the terms, found in the acronym "**AUGUST**" which stands for
    i. **A**llocation of ownership – percentages, shares; valuation; adding to one's share when a *call* is made, or voluntarily; shares *per capita or per stirpes* in the third generation
    ii. **U**nderstanding of purpose – for family only, for rental, to make money, to break even, year-round or seasonal, "as is" or renovated with modern conveniences
    iii. **G**overnance of the enterprise – trustee or trustees, manager, committee of the whole, rotating responsibility, elections, removal, succession
    iv. **U**se regulations – everything from cleaning up after yourselves to refiling the boat gas
    v. **S**tewardship of resources – budgeting, capital accounts, contributing to costs and consequences when you don't
    vi. **T**ransferability of interests – to whom can ownership be passed? Descendants only? Spouses? Protections against forced sales, bankruptcy, and transfers – LLC-type provisions; how long will this arrangement last before there is a sale; what's the price at buyout? Is there any discount?

8. WHAT ARE THE TRUST DRAFTING, ELDER LAW, AND TAX ISSUES ASSOCIATED WITH SECOND HOME AND MULTI-GENERATIONAL RESIDENCE PLANNING?
    i. Buy-sell, option to purchase, right of first refusal
    ii. Appraisal and appraisal tie breaking
    iii. Discounts off the market value when buying other owners out
    iv. Funding using an amount provided by
        A. Fixed amount off the top
        B. Life insurance proceeds
        C. Sale of another property

D. A formula based on recent annual costs x years x 120%

v. Where to place the terms in the trust – the residuary clause or a special section

vi. In an LLC operating agreement – a separate article or even a separate agreement

vii. Irrevocable vs. revocable

viii. Gradual gifting: gift (Crummey) trust, nominee trust, LLC interests

ix. Reducing value at transfer with minority and lack of marketability discounts

x. Asset protection trust structures – ascertainable standards vs. total discretion by the trustees

xi. Lifetime qualified marital deduction trust (Lifetime QTIP). The QTIP affords asset protection and basis step-up

xii. Spousal Lifetime Access Trust (SLAT). This trust is a completed gift to descendants (with access to the spouse) and provides asset protection, but no basis step-up.

xiii. Qualified personal residence trust (QPRT) – more on this technique later

xiv. Domestic asset protection trust (DAPT) in, e.g., Delaware or Nevada, for asset protection

xv. Life estates for children with a remainder to charity

b. Transfers for Medicaid application purposes

i. Revocable trusts – still countable for spend down

ii. Irrevocable trusts – 5-year lookback; estate inclusion for step up

iii. Retention of life estate with gift of the remainder; also allows for step up

iv. Lease agreement, with 100% gift

c. Tax basis considerations

i. Carry-over vs. step-up in basis. How relevant is this?

ii. What is the time horizon? Is the estate of the grantors taxable?

9. HOW CAN CLIENTS SAFEGUARD THE HOME FROM BEING LOST TO THEIR OWN CREDITORS, PREDATORS AND LONG-TERM CARE COSTS THAT WOULD FRUSTRATE THEIR PLAN FOR SUCCESSION?

a. See previous points – LLCs, Irrevocable trusts for asset protection

b. Prenuptial agreements intended to keep heirlooms from becoming marital assets

c. Medicaid sensitive trusts - income-only, no-income, third party and non-party trusts

10. HOW CAN CLIENTS PROTECT THE HOME FROM THEIR HEIRS' CLAIMS – THE DIVORCES, DEBTS, DISABILITIES, DESTRUCTIVE CHOICES, AND DEATH TAXES OF THEIR CHILDREN?
    a. Non-transferable shares
    b. Shares in trust ownership with discretionary trustee or ascertainable standard
    c. Supplemental Needs Trusts or discretionary trusts
    d. Spray and sprinkle among multiple beneficiaries so that vulnerable beneficiary has no individual rights
    e. Trust decanting and protector provisions

11. WHAT ARE USEFUL FINANCIAL STRUCTURES TO HELP ASSURE CLIENTS THAT THERE WILL BE FUNDING TO ASSIST THE NEXT GENERATION IN KEEPING THE PROPERTY?
    a. Minimum capital requirement, such as 5, 10, etc. years of funding
    b. Bookkeeping using software or CPA services
    c. Tracking of capital expenditures of every kind
    d. Tracking contributions
    e. Valuation at times of unequal contributions or playing catch up, e.g. after 5 years
    f. Tax return preparation if treated as rental property

12. FINANCIAL FUNDING TOOLS AND TECHNIQUES
    a. Life insurance. This planning should start early as age and health affect the affordability of premiums.
        i. How much insurance? – how much can you afford? Look at the property budget and how many years the arrangement is to last.
        ii. Sometimes the easiest thing is to tie the length of the arrangement to the length the life insurance proceeds will last
        iii. Consider insuring the next generation of owners. This will treat the arrangement like a business buy/sell. Surviving owners can use the proceeds to buy out the estate of the deceased owner.
    b. A sum off the top of the estate. Run the arrangement as long as the money lasts. Then a sale with rights of first refusal.

c. Allocating a Roth or Traditional IRA to the cause. The inherited IRA will provide funding measured by the RMDs (required minimum distributions) though more can be paid out as needed. The RMDs can be paid to a standalone trust or to trust shares qualifying as "conduits" to the actual beneficiaries. The inherited IRA share trusts are either partners or simply funding mechanisms. Unless based on the age of the oldest beneficiary, distributions from the inherited IRA would need to be equalized despite different RMD amounts due to differing ages of the beneficiaries. The combination of tax-free or tax deferred status will be an additional bonus to the program over an after-tax sum
d. Annual gifting to the trust or LLC. This is basically self-insuring. This can be very attractive to the family who does not want to insure, wants to reduce the size of the estate for tax purposes, and likes the idea of a cushion against unforeseen expenses. If paid as rent, it can exceed the annual gifting done elsewhere in the estate plan.
e. Giving "permission" to rent out the property to make money for the trust or LLC

13. WHAT TO DO AT THE END OF THE TERM?
    a. At the end of the Heirloom Property term, there should be rights of first refusal to purchase the property. Failing this, a sale will be necessary. It is a good idea to make this intent clear and to make it OK, i.e. giving permission to "call it a day" on the co-ownership adventure.
    b. Those who continue with the property should be required to continue the existing agreement or renegotiate an AUGUST arrangement. If they fail to have a written agreement, the trustee or Manager must sell the property.

14. WHAT ARE SOME MARKETING POINTERS TO REACH MORE POTENTIAL CLIENTS IN YOUR MARKET?
    a. Talk with financial advisors and CPAs about this unique planning niche and look for opportunities to co-present to their clients
    b. Present to your own existing clients with second homes
    c. Look for vacation communities where public seminars make sense
    d. Write an outline of your approach to this issue for clients
    e. Let your network know that you have a niche in planning for the vacation or heirloom property

f. Team up with financial advisor(s) who share the passion

15. HOW CAN YOU ESTABLISH YOURSELF AS A GO-TO AUTHORITY ON VACATION HOME AND HEIRLOOM PROPERTY SUCCESSION?

a. Be prepared with your own provisions or work
b. Write article or posts on second home topics e.g. LinkedIn: Small vacation home is beautiful
c. Overlap with estate, gift, and income tax matters
d. Start a separate webpage
e. Give a library talk in a community of second home owners
f. Stay familiar with related real estate and tax issues
g. Do a talk for a financial planning, bar or CPA group

CASE STUDIES

Ex. 1.

WIDOW WITH 4 CHILDREN WITH DIVERSE INTERESTS

- Mother is the owner of a property on Cape Cod, Massachusetts. She is a Florida resident. There are 4 children.
- 2 siblings are using and interested in keeping the property
- 1 is disabled – she is open to deeding her interest to a trust for her two children – good thinking, though we are not sure of their level of interest commitment or ability to contribute. If she doesn't make this transfer, the property may be subject to having to be sold to pay for her care
- 1 is not interested in keeping the property but is neutral saying to Mom, "You can do what you want…"
- Client says, "There should be enough money for the family to keep it." She has an estate plan but has not done anything to plan for this asset. She has ample resources to plan with but shows a lack of appreciation of the issues.

1. Mom is high net worth: Mom needs to do an heirloom property agreement, funded with money to enable the long-term for the retention of the property. Her estate is large enough that she can give the property to the two children who are interested in the home and provide offsetting gifts to the children who are not interested in the property. She should consider state-law tax issues. Mass. will impose estate tax on the real estate of an out-of-stater at death.
2. If Mom had only modest means: She probably should require that the property be sold, or possibly allow for a brief period in which the property can be enjoyed by her heirs, paid in part by her, and in part by those who use the property.
3. Either way, she needs to do supplemental needs trust planning for her disabled daughter.

Ex. 2.

THIRD GENERATION FAMILY HEADING FOR DISASTER

- First generation 1970s– Before death, folks set up a good, but rigid plan in a trust for the next generation with limited funding.
- Second Generation – Let the condition slide.
- Third generation 2013 – cousins – inherited major repairs, draining the funds
- Trust soon to terminate, when the oldest child of the second generation dies – trust beneficiaries will inherit – currently divorces, lawsuits, cancer facing them. Strong management allowed in the hands of the trustee but no mechanism to end the arrangements early and no ability to sell in the trustee's discretion.
- One VERY interested family among them; Two uncooperative families; but no buyout mechanism.

1. This will take extraordinary cooperation in the negotiation. Lots of tension in this situation. Were it not for the ability of the very interested family to afford to buy the others out, there would be a petition to partition. Could result in a petition to partition. The best result is a buyout.
2. In the meantime, the trustee should create an LLC so that at termination of the trust, the beneficiaries are not tenants in common without management, but limit the duration and terms so that the trustee does not have.

Ex. 3.

DAD JUST WANTS CHILDREN TO HAVE THE CHANCE TO ENJOY FOR A DECADE

- 3 children all interested with limited means
- modestly priced, well-maintained home with moderate annual costs
- $200,000 available from a Roth IRA to set aside for “as long as it lasts.”

Best advice:

1. Provide a strong trustee who is unquestionably fair and transparent.
2. Provide that there will always be two signatories on any accounts, bookkeeping, and an annual meeting to discuss the budget, account balances, and projects, or have all three take on various roles.
3. Try for 10 years, maybe 15, but with inflation and unexpected costs, be conservative.
4. Provide for a trust protector to appoint an independent trustee to take over if there is an impasse among the siblings.
5. Dad should make a purpose statement that clearly states cooperation and enjoyment, and that the property should not become a source of deep friction in the family as the chief values

MARKETING

MODEL FOR A SEMINAR IN VACATION TOWN, USA

Team up with a local advisor or banker. His/her office will be needed for meetings with prospects if you are not from the community. Be clear that you need top billing. Plan how the advisor or banker can contribute on the related financial strategies for keeping the home, paying for the home in retirement, and such topics that interest the advisor.

Structure the program as the out-of-town authority (the definition of the “expert”) is sponsored by the local financial advisor or even a local attorney.

Buy a mailing list /service to target a postcard to the vacation homeowners /affluent subsection.

Place the postcard in the newspaper and buy digital promotion in the banner of the online edition. Make the postcard nice. Don’t skimp on this detail. Many folks save the card for future reference.

Consider either a library (education oriented), vacation community (combined with another event perhaps) or church fundraiser event as a guest speaker (make it brief). Or if you can justify it, a dinner seminar at a nice restaurant, hotel or country club setting. Hold two-four events to get your money’s worth out of the advertising. You can make this event as “commercial” as you like given that you're paying for it. You’ll get “plate lickers” (I have had people come 4 summers straight never to engage – for anything).

Have the local advisor introduce you as an authority. Integrate with general estate planning pointers. Many who attend will meet with you just get their estate planning done.

Beware the out-of-state residents. (Florida residents summering in Maine, for example) be prepared to either co-counsel of have a plan in some way to coordinate with the home state estate plan. Hold the event early in the summer so that you have time to meet with prospects during July and possibly have document signings in August and September. If you do it year after year, add bonus material, like the New Tax Code, Protecting your home against long term care expense, Liability protection for your home.

Advising Fiduciaries on the Administration of Closely-Held Real Estate Entities

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REAL ESTATE FOR ESTATE PLANNERS
NYSBA Meeting October 18-19, 2018
The Sagamore Resort, Bolton Landing, NY

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Advising Testators and Fiduciaries On Closely-Held Real Estate Entities

Executors and trustees often step into the shoes of a decedent who was a partner, member or shareholder of an entity owning real estate. Such fiduciaries may also own an interest in the entity in their individual capacity and, further complicating matters, have a position of control at the entity level. Often such a person is, from the decedent's perspective, the best – and possibly the only – person capable of administering the decedent's interests. Potential conflicts abound, however, and special care must be taken in the planning and administration stages to protect the fiduciary to the greatest extent possible and ensure the continued successful operation of the business. This article discusses some of the issues that may arise when real estate is owned in entity form by a trust or estate as well as how to anticipate and address those issues.

A. Planning for Maximum Autonomy at the Entity Level

It is obviously important to address, as part of the planning process, the business owner's expectations for the continued operations of the entity following his death. Among the many considerations is whether the owner is comfortable with continuation of the entity's operations in the same manner as before his death. Should the person currently charged with management of the entity have sole discretion to retain and operate the underlying properties?

* The authors are grateful for the invaluable assistance of John Guccione, an associate at Greenfield Stein & Senior, LLP, in the preparation of this article.

To sell the properties or engage in other capital transactions? To decide whether and when to distribute dividends or profits to the beneficiaries of the trust or estate?

Family considerations must also be addressed. How are relations between the current manager of the real estate entities and other family members? What protections (if any) should non-active partners or members have? Should the manager's powers be circumscribed in any way? Are there circumstances under which other partners or members should be given the power to remove the person serving in a management role?

There may also be multiple business entities in the family's business empire. Does family ownership of the various affiliates overlap and, if so, should transactions with affiliates be expressly authorized, limited, or disclosed to other members/partners?

Finally, there are important legal considerations. What standards govern the conduct of persons serving in dual roles as fiduciary and manager of a real estate entity, and under what circumstances is the testator permitted to modify those standards via testamentary instrument?

Often, the owner (Senior) has long worked with and groomed a family successor (Junior) and desires to grant him or her maximum protection, authority, and discretion to continue the operation of the real estate business that has been the source of the family's wealth. While there are limits on the extent to which Junior can be relieved of obligations imposed upon fiduciaries by law, incorporating Senior's wishes into the governing instrument is critical to achieving his goals after death.

1. The Duty to Diversify

New York's Prudent Investor Act ("PIA") (EPTL §11-2.3) provides the statutory framework for fiduciary investments. It incorporates the principles of Modern Portfolio Theory, a mathematical theory that has three primary tenets: first, riskier investments will offer a greater return to compensate for greater risk; second, diversification can reduce risk without decreasing the return on investment; and third, allocation of assets between riskier and safer investments will determine exposure to broad market risk. C. Raymond Radigan and Jennifer F. Hillman, The Evolution of Prudence in Trustee Investing, N.Y.L.J., July 9, 2013.

The PIA requires trustees to diversify assets unless they reasonably determine it is not in the beneficiaries' best interests to do so in light of the purposes of the trust and its provisions. EPTL §11-2.3(b)(3)(C); Matter of HSBC Bank USA, N.A. (Knox), 98 A.D.3d 300, 310 (4th Dep't 2012). Inasmuch as diversification can be used to reduce risk without decreasing return, it is considered imprudent for a trustee to retain a concentration unless special circumstances so warrant. That is so even if the concentrated holding is performing well and is projected to continue to do so. Matter of Dumont, 4 Misc. 3d 1003(A) (Sur. Ct., Monroe Co. 2004), rev'd on other grounds sub nom. Matter of Chase Manhattan Bank, 26 A.D.3d 824 (4th Dep't 2006).

In light of the mandates of the PIA, special provision should be made in the testator's Will reflecting his or her wish that real estate investments be retained and the business continued following death. Such language may serve as an important defense against a charge that the fiduciaries should have sold or otherwise disposed of the assets. Matter of Gerlach (Marino), 2017 N.Y. Misc. LEXIS 4142 (Sur. Ct., New York Co. 2017). Note, however, that an authorization to retain assets or a waiver of the duty to diversify does not relieve fiduciaries of

the duty to act prudently in deciding whether to do so. E.g., Dumont, 4 Misc. 3d 1003(A) at *18–20 (retention clause does not "insulate the fiduciary from liability where the fiduciary's actions were imprudent" and "where prudence dictates sale, a retention clause is superseded"). The PIA generally requires trustees to determine within a reasonable time whether to retain or sell inception assets. EPTL §11-2.3(b)(3)(D). Special circumstances that may work to justify retention of entities owning real property include:

- The asset's special relationship or value to some or all of the beneficiaries. HSBC Bank USA, N.A. (Knox), 98 A.D.3d 300 (noting "special relationship" between grantor's family and stock retained in trust and co-trustee's desire to retain stock in family businesses); Matter of Hyde, 44 A.D.3d 1195 (3d Dep't 2007) (court observed that settlors wanted stock of closely-held company to remain in the family and used trusts to accomplish that result). Where an estate consists of a family-run business or business interests, the relevant instrument may indicate that the decedent intended those assets to be continued in trust.

- The impossibility of realizing a fair price in a sale. Hyde, 44 A.D.3d 1195 (trustees were justified in retaining stock because there was no market for it and sale would have required a substantial discount). Discounts for lack of control and marketability reflect real-life market conditions. A fiduciary is unlikely to be able to sell a non-controlling, minority interest for a price that reflects the underlying asset's value to the beneficiaries.

- The inability to replicate the existing income stream through other investments. HSBC Bank USA, N.A. (Knox), 98 A.D.3d 300 (trustees were justified in retaining concentration of company stock that served as main source of income for trust beneficiaries). Relative to their value, operating business properties often throw off a healthy cash flow with favorable income tax consequences. Combined with the inability to realize an attractive sales price, this is a powerful reason to retain such assets.

While retention of real property received from the decedent may be deemed prudent even if purchase of the property by the trustees would not (Id.; Matter of Hahn, 93 A.D.2d 583 (4th Dep't 1982); Matter of Kopec, 25 Misc. 3d 901 (Sur. Ct., Monroe Co. 2009), aff'd 79 A.D.3d 1732 (4th Dep't 2010)), trustees must nevertheless consider all relevant factors in determining the best course of action. They cannot simply assume that retention of the assets

is prudent. E.g., Kopec, 25 Misc. 3d at 907 ("there is a critical line between [a] deciding upon retention after considering all facts and circumstances according to the statute, and [b] merely doing *nothing* with respect to the assets at issue" [emphasis in original]).

Including provisions in the testator's Will concerning what factors should weigh in favor of retaining properties or, conversely, selling them, will provide guidance both to the fiduciaries charged with making that threshold determination and to the courts asked to second guess those decisions. Consider the following for inclusion in the governing instrument:

- Authorize the fiduciaries to retain indefinitely or for any lesser period all or any assets of the estate or trust, specifically including interests in closely-held entities.

- Authorize retention regardless of whether the assets are authorized by law for the investment of estate or trust funds, regardless of any law requiring diversification, and without any liability for loss because of depreciation in value.

- Express a desire and intention that the family business enterprise be continued and (if desired) grown and expanded for future generations.

- Authorize the fiduciaries to make any new investment or reinvestment of estate or trust funds in the closely-held business activities, regardless of any law requiring diversification, and (subject to exceptions such as where there is a marital deduction) even if such investment is (or becomes) unproductive of income or speculative.

2. Standards of Conduct Applicable to Fiduciaries

Fiduciaries must perform their duties with diligence and prudence. Accordingly, a provision in a Will relieving executors or testamentary trustees from liability for negligence is unenforceable under New York law (EPTL §11-1.7). In the event fiduciaries fail to use reasonable care, diligence and prudence in the performance of their duties, they may be held liable for any resulting damage to the estate or trust.

A fiduciary also owes a duty of undivided loyalty to the beneficiaries. Gerlach, 2017 N.Y. Misc. LEXIS 4142. Generally speaking, when a trustee finds himself in a position

where his own personal interests may be served by a given course of conduct, the "no further inquiry" rule will be applied, and no inquiry will be made into whether he was acting in good faith or even whether the actions taken by him in fact also serve the best interests of the trust. City Farmer's Trust Co. v. Cannon, 291 N.Y. 125, 132 (1943) ("when the trustee has a selfish interest which may be served, the law does not stop to inquire whether the trustee's action or failure to act has been unfairly influenced[;] [i]t stops the inquiry when the relation is disclosed and sets aside the transaction or refuses to enforce it"); Matter of Lundberg, 197 N.Y.S.2d 871 (Sur. Ct., Westchester Co. 1960). Instead, the transaction will be deemed voidable at the election of the objecting party. Matter of Birnbaum v. Birnbaum, 117 A.D.2d 409 (4th Dep't 1986); Matter of Grace, 42 Misc. 2d 214 (Sur. Ct., New York Co. 1964). Furthermore, such a conflict may serve as the basis for removal of an interested trustee. Matter of Rothko, 43 N.Y.2d 305 (1977); Matter of Burack, N.Y.L.J., Mar. 26, 1993 at 25, col. 1 (Sur. Ct., Westchester Co.) (removal is warranted where conflict of interest motivates fiduciary to seek personal gain at the expense of the trust); Matter of Stern, N.Y.L.J., Sept. 15, 1989, at 25, col. 1 (Sur. Ct., Westchester Co.) (when a trustee "has placed himself in such a position that his personal interest has or may come in conflict with his interest as trustee, then… the court never hesitates to remove him").

While the duty to act prudently cannot be waived by a testator, the rule of undivided loyalty may be relaxed where the testator is determined to have authorized the conflict. E.g., Matter of Balfe, 245 A.D. 22, 23 (2d Dep't 1935) (testator has "the power and the right" to authorize the trustee to "act under conditions of divided loyalty"); Matter of Dow, 32 Misc. 2d 415, 419 (Sur. Ct., Chautauqua Co. 1955), mod. on other grounds, 3 A.D.2d 968 (4th Dep't 1957), aff'd, 5 N.Y.2d 739 (1958) (if testator "desired to deprive his trust estate of the

benefits of the doctrines in the cases that forbid trustees acting under circumstances that involve what is called 'divided loyalty,' he had the perfect right to do so"). Such relaxation may be effected by the express or implied terms of the Will or where the circumstances are such that the testator knew, at the time that the Will was drawn, that the appointment of particular fiduciaries would expose them to a conflict between their personal interests and fiduciary obligations. E.g., Renz v. Beeman, 589 F.2d 735, 744 (2d Cir. 1978) ("[i]t is true that even a trustee's duty of 'utmost loyalty' can be reduced by means of language in the trust instrument permitting certain transactions involving self-interest… or by express consent of the settlor"); Matter of Kellogg, 35 Misc. 2d 541 (Sup. Ct., Erie Co. 1962) (trustee not subject to surcharge for conflict where he acted as officer of company prior to creation of trust that retained company stock and thus was placed in position of conflict by settler, and, further, where trust instrument expressly authorized retention of stock); Matter of Weiss, 33 Misc. 2d 773 (Sur. Ct., New York Co. 1962) (conflict of interest between interests of estate and corporation does not serve as ground for removal of executor where conflict was created by decedent's will); see also, Hoopes v. Bruno, 128 A.D.2d 991 (3d Dep't 1987) (given others' history of dual roles as trustees and officers of the company and current trustee's prior role as director and manager, question of fact existed as to whether settlers authorized conflict arising from trustee's promotion to executive vice president of company).

When the conflict has expressly or impliedly been authorized, the duty imposed upon interested trustees is reduced to one of good faith in administering the trust. O'Hayer v. de St. Aubin, 30 A.D.2d 419 (2d Dep't 1968); Balfe, 245 A.D. 22; Matter of Stern, N.Y.L.J., Sept. 15, 1989, at 25, col. 1 (Sur. Ct., Westchester Co.); Dow, 32 Misc. 2d 415. Such fiduciaries will be held liable only "if [they] commit[] a breach of trust in bad faith or intentionally or with

reckless indifference to the interests of the beneficiaries, or if [they have] personally profited through a breach of trust." O'Hayer, 30 A.D.2d at 423 (internal quotations omitted). Under this standard, fiduciaries remain under a duty to exercise good faith by acting in the best interests of the trust and are prohibited from subordinating the beneficiaries' interests to their own personal ones. E.g., Matter of Stern, N.Y.L.J., Sept. 15, 1989, at 25, col. 1 (Sur. Ct., Westchester Co.) (interested trustee subject to standard of good faith was removed where he was found to have elevated personal interests derived from managing corporation held in trust over interests of income beneficiary).

The testator's intention to authorize dual-role fiduciaries to act under the reduced standard of good faith and to engage in transactions that may otherwise be prohibited should be explicitly stated in the instrument. Consider the following provisions authorizing the fiduciaries:

- To sell any estate or trust property to any person, including any beneficiary or any estate, trust or entity in which any beneficiary has an interest, on such terms as they deem appropriate.

- To exercise all rights and powers over closely-held business entities that would be exercisable by persons owning similar assets in their own right, such as the power to elect directors or officers, including the election of the fiduciary to serve as a director or officer.

- To acquire additional closely-held entity interests from any other person, including any beneficiary, or any estate, trust or entity in which any beneficiary has an interest.

- To continue to manage any entity interest in the same manner as it was managed when received by the estate or trust, to change the nature of any such interest, to transfer it to any new entity in which the fiduciary may also be an owner, and to act or refrain from acting with respect to any such interest without being liable for any loss or depreciation to the estate or trust.

- To accumulate reasonable reserves for future contingencies and to determine policies concerning depreciation and obsolescence.

3. Standards of Conduct Applicable to Dual Fiduciaries

The family member (Junior) running the business operations and serving as fiduciary may already own interests in the operating entities, and the interest Junior is expected to hold in his fiduciary capacity may be a controlling one. That control may, in turn, change the nature of Junior's duties at the entity level.

Indeed, where a trust or estate owns a controlling interest in an entity and the entity's directors or managers are acting by virtue of that controlling interest, courts have rejected the usual corporate standard of duty[1] and instead judged the conduct of executors/trustees acting as directors by fiduciary standards. Matter of Tuttle, 4 N.Y.2d 159, 164 (1958) (where estate owned virtually all stock and executors became controlling directors, "their duties in the two capacities were indistinguishable and the corporate entity [was] disregarded in fixing the duties of the executors-trustees"); Matter of Horowitz, 297 N.Y. 252 (1948) (executor who was installed as director and officer by virtue of his fiduciary appointment was liable as a matter of fiduciary law for corporation's award of excess compensation to fellow director); Matter of Schulman, 165 A.D.2d 499, 502 (3d Dep't 1991) (where officer/director obtained authority to manage entity by virtue of his appointment as executor/trustee, fiduciary standards, not business judgment rule, applied to his conduct).

Where a trustee has obtained control of a closely-held entity by virtue of a combination of the trust's holdings and his own, courts will likewise judge his conduct with respect to the entity's operations by the rules governing a trustee's performance. Matter of Hubbell, 302 N.Y. 246, 254–55 (1951) (where trustee owned all stock in his individual or

[1] Directors are typically subject to the business judgment rule. Under this rule, courts defer to the actions of corporate directors so long as they are "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." Matter of Goerler, N.Y.L.J., Sept. 22, 1993 at 27, col. 3 (Sur. Ct., Nassau Co.), citing Auerbach v. Bennett, 47 N.Y.2d 619, 629. See also, Matter of Carvel, 1996 N.Y.L.J. LEXIS 7211, *6 (Sur. Ct., Westchester Co.) (under the business judgment rule, "if an officer or director makes a decision in good faith that he believes to be in the best interests of the corporation, he will not be held liable if it transpires that it was a bad business decision or it has a negative impact on the corporation").

fiduciary capacities, his fiduciary obligations as trustee extended to the operation of the corporation). In contrast, where the trust is but a minority shareholder, in the absence of a showing of bad faith, fraud, or abuse of discretion, courts will generally apply the business judgment rule in determining the liability of trustees who are managing the entity. Matter of Carlisle, 53 Misc. 2d 546, 551–52 (Sur. Ct., Suffolk Co. 1967) (where trust held 50 shares and trustee individually held 700 shares out of 1,000 outstanding, court applied business judgment rule in adjudicating beneficiary's objection to corporation's dividend policy).[2]

To give dual-role fiduciaries maximum protection and autonomy, consider the following for inclusion in the governing instrument:

(a) Explicitly authorize fiduciaries to retain any and all business entities and to continue to operate them in the same manner, and subject to the same duties and standards of conduct, as were imposed upon them prior to Senior's death. Such a provision addresses both the prudence of retaining significant illiquid assets and the imposition of fiduciary standards at the entity level.

(b) Acknowledge and explicitly "bless" the inherent conflicts arising from Junior's ownership of entity interests in his own name and his interests as a beneficiary and fiduciary. For example:

- State that Senior has absolute confidence in Junior's judgment and authorize him to make all business and fiduciary decisions as he determines appropriate in his sole and absolute discretion.
- Authorize Junior, as fiduciary, to deal with himself in his individual capacity as if he were a third party, without liability except for negligence or wilful misconduct.

[2] As stated by the court: "When the trust asset is in the form of corporate stock there is no 'income' until a dividend has been declared. Whether dividends shall be paid and the amount is a matter to be determined by the directors in their discretion. A court is not justified to interfere unless there is bad faith, fraud, a clear abuse of discretion, or dishonesty on the part of the directors." Carlisle, 53 Misc. 2d at 553–54.

- Provide that the "usual" rules prohibiting a fiduciary from dealing with himself as an individual (or with respect to any matter in which he has an interest that is personal or individual) shall not apply. Consider expressly authorizing Junior to become a member or partner in any entity in which the trust has an interest.

(c) If applicable, address Junior's ability to undertake transactions with affiliates. For example:

- Authorize Junior to engage in affiliate transactions (whether those owned in whole or part by him or those owned by the trust/estate) and absolve Junior from liability for doing so to the extent permitted by law.

(d) Anticipate decisions that may arise in connection with a dual-role fiduciary's continued management of the entities. For example:

- Authorize Junior to make decisions regarding capital transactions, to the extent possible, at the entity level and fiduciary level.

- Authorize Junior to select, vote for and remove directors, to take part in management, to establish corporate policies, and to engage management personnel.

- Authorize Junior to create reserves and determine, in his sole discretion, whether and when to make distributions of profits.

- Authorize Junior to do anything and everything that he deems necessary and advisable in connection with the affairs of the entity.

3. Compensation at the Entity Level

Provisions in testamentary instruments governing the compensation of fiduciaries for services rendered at the entity level are generally honored by the courts. E.g., Gerlach, 2017 N.Y. Misc. LEXIS 4142 at *10 ("a testator is generally free to provide for the compensation of his fiduciary as he wishes"); cf. Matter of Grant, 155 Misc. 2d 819, 820 (Sur. Ct., New York Co. 1993) ("New York courts routinely follow the testator's directions concerning fiduciary compensation"). See also, Horowitz, 297 N.Y. 252 (where will authorized executors and trustees

to elect themselves officers and directors of corporation and to receive salaries therefrom, court allowed salaries but disallowed bonuses and severance).

If the will is silent on compensation to be paid to an executor or testamentary trustee for services rendered to an estate-owned entity, courts focus on whether the services provided by the fiduciary at the entity level are beyond the scope of those expected to be performed in their role as executor or trustee. Matter of Berkowitz, 2006 N.Y.L.J. LEXIS 647, *22 (Sur. Ct., New York Co.) ("an executor may pay himself added compensation where he offers the property or business in question something that is not expected of him qua executor"); Matter of Smythe, 6 Misc. 2d 130, 136 (Sur. Ct., Westchester Co. 1942) ("extra compensation has been awarded where a fiduciary performs services in addition to those incidental to his office or imposed upon him by the terms of the will" [internal quotations omitted]). In such a case, the court is likely to permit the executor to receive both commissions and compensation for services rendered at the entity level.

In determining whether additional compensation is appropriate, courts also focus on whether the fiduciary acted in the same capacity during the testator's lifetime. Gerlach, 2017 N.Y. Misc. LEXIS 4142 at *10 ("where an executor has direct experience managing a subject property or business during the testator's lifetime, additional compensation for such services may be allowable"); Berkowitz, 2006 N.Y.L.J. LEXIS 647 (if nominated executor who had long overseen decedent's real estate and other interests had served, he would likely have been entitled to keep his salary); Matter of Block, 186 Misc. 945, 950–51 (Sur. Ct., Bronx Co. 1946) (court rejected application to remove co-trustee who was receiving salary from corporation partially owned by trust, reasoning that trustee had acted as an officer and received compensation prior to the testator's death).

Where the fiduciary was not previously involved with an entity and ascends to control only by virtue of his appointment as executor or trustee, courts are more cautious about awarding compensation for services provided at the entity level. E.g., Berkowitz, 2006 N.Y.L.J. LEXIS 647 (where executor was promoted to CEO after the testator's death and had no prior experience managing decedent's commercial realty or other business operations, court limited his compensation to commissions and denied him annual salary and other benefits from businesses). Indeed, fiduciaries who are strangers to the entity before the testator's death but nevertheless install themselves into positions of control and award themselves salaries risk removal from office. E.g., Matter of Grossman, 157 Misc. 164, 168 (Sur. Ct., New York Co. 1935), aff'd, 250 A.D. 503 (1st Dep't 1937) .

If additional compensation is permitted for entity-level services, its rate will be established by reference to the terms of the Will or, if it is silent, the reasonable value of services rendered. Matter of Reichberg, 2002 N.Y.L.J. LEXIS 3242, *3 (Sur. Ct., Westchester Co.) (to assess compensation at entity level, court must look to services performed and qualifications of executor to perform them). Whether compensation is reasonable should be based on all the facts and circumstances. In making this determination, in the absence of guidance from the governing instrument, courts often begin by examining the level of compensation that was paid during the lifetime of the testator. Smythe, 6 Misc. 2d at 138–39; Berkowitz, 2006 N.Y.L.J. LEXIS 647 (court held that executors had failed to justify increases in salary and benefits received by comptroller following testator's death); Matter of Ajar, N.Y.L.J., June 1, 1992 at 24, col. 5 (Sur. Ct., Nassau Co.) (while court declined to enjoin trustee from paying herself, as officer and director of corporation, a salary in excess of the amount paid prior to the grantor's death, court

cautioned that trustee could be surcharged for any amount in excess of reasonable compensation).

In the event the court determines that compensation paid by the entity was excessive, the directors who authorized it may, to the extent their positions in the corporation resulted from their roles as executor or trustee, be held liable to the estate or trust for the excess. Horowitz, 297 N.Y. at 258. To guard against such potential liability, consider making explicit in the governing instrument Junior's right to receive both commissions and compensation at the entity level. Provide guidance concerning who should control compensation decisions and, if possible, how such future compensation should be determined. If bonuses, severance, or other perquisites have traditionally been part of the compensation structure, consider authorizing Junior to continue that practice. Consider the following for inclusion in the governing instrument:

- Authorize compensation to be paid for serving as director, officer, employee or agent of the closely-held entity, in addition to compensation for serving as a fiduciary.
- Authorize the fiduciaries to establish and implement a compensation structure for services rendered to an entity in which the estate or trust owns an interest, including compensation to be paid to a person also serving (and receiving compensation) as a fiduciary or as an officer, director or employee of any one or more affiliated entities.
- Broadly define "compensation" to include salary, commissions, bonuses, and any benefits and perquisites that may be expected to be part of the compensation structure.
- Acknowledge that compensation standards may change over time and authorize revisions and adjustments to the compensation structure from time to time, to reflect changes in circumstances and in the market.

4. Usurpation of Opportunities

The duty of undivided loyalty prohibits fiduciaries from engaging in self-dealing by taking for themselves opportunities and assets that rightfully belong to a trust or estate. The

issue of usurpation can arise, for example, where a fiduciary establishes an entity to provide management or other services in respect of real property owned by the estate or trust. See, Matter of Chadrjian, 10 Misc. 3d 1077(A) (Sur. Ct., Nassau Co. 2006) (court suspended letters of trusteeship upon finding that trustee usurped trust opportunity by establishing company that competed with trust-owned LLC providing contracting services to trust-owned real estate entities).

In determining whether a fiduciary improperly usurped a trust opportunity, New York courts borrow heavily from the corporate opportunity doctrine. The most widely used tests for determining whether a fiduciary has improperly usurped a trust opportunity are the expectancy test and the line of business test.

Under the expectancy test, the relevant inquiry is whether the trust has a "tangible expectancy" in the property acquired, i.e., whether the trust has an interest in, or has already resolved to acquire, the subject property or similar property – as opposed to merely hoping to do so or finding the property desirable. Morales v. Galeazzi, 72 A.D.3d 765, 766 (2d Dep't 2010) (corporation had no tangible expectancy in purchasing land adjacent to its premises); see also, Burg v. Horn, 380 F.2d 897 (2d Cir. 1967); Design Strategies, Inc. v. Davis, 384 F. Supp. 2d 649, 672 (S.D.N.Y. 2005), aff'd, 469 F.3d 284 (2d Cir. 2006); Blaustein v. Pan Am. Petroleum & Transp. Co., 293 N.Y. 281 (1944); Lee v. Manchester, 118 A.D.3d 627 (1st Dep't 2014); Alexander & Alexander of N.Y. v. Fritzen, 147 A.D.2d 241, 247–48 (1st Dep't 1989); Yu Han Young v. Chiu, 13 Misc. 3d 1232(A) (Sup. Ct., Queens Co. 2006), aff'd, 49 A.D.3d 535 (2d Dep't 2008). Whether an expectancy is "tangible" depends in large part on the likelihood of realization by the trust from the opportunity presented. Design Strategies, 384 F. Supp. 2d at 672; Am. Fed. Grp., Ltd. v. Rothenberg, 2003 WL 22349673, *12 (S.D.N.Y. 2003).

Under the line of business test, the relevant inquiry is whether the opportunity is necessary or essential to the trust's existing property or business. Design Strategies, 384 F. Supp. 2d at 672; Alexander, 147 A.D.2d at 248. Courts have declined to adhere rigidly to the requirements of this test. Lee, 118 A.D.3d 627. Of those that have applied it, some have rejected the suggestion that corporations/trusts are entitled to opportunities that would allow them to expand, while others have found a breach of duty where the property acquired would have been a natural outgrowth of the existing business. Compare, Alexander, 147 A.D.2d at 249, with O'Hayer, 30 A.D.2d at 426–27.

A third possible test for measuring whether a fiduciary has usurped an opportunity is whether, at the commencement of the relationship, "the parties understood… that the employee, officer or director would simultaneously pursue other interests, even ones related to or in direct competition with the business of the corporation." Alexander, 147 A.D.2d at 248; see also, Burg, 380 F.2d at 900.

No single test is consistently applied to determine whether there existed an opportunity subject to usurpation; rather, courts consider all relevant facts and circumstances. Lee, 118 A.D.3d 627; Burg, 380 F.2d at 901. Relevant considerations include:

- Whether the property is necessary or essential to the business or success of the trust. Burg, 380 F.2d at 900.
- Whether the trustee would normally be expected to pursue the opportunity on behalf of the trust given the trust's purposes and the decedent's goals and expectations for its administration. O'Hayer, 30 A.D.2d at 427 (land speculation was not within "legitimate objective" of trust corporations engaged in manufacturing business).
- Whether the trustee's acquisition of the property would put him in competition with the trust or the trust would otherwise be harmed by the acquisition. Burg, 380 F.2d at 901; Foley v. D'Agostino, 21 A.D.2d 60 (1st Dep't 1964); Motherway v. Cartisano, 2014 N.Y. Misc. LEXIS 2145 (Sup. Ct., Suffolk Co. 2014).

- Whether the trustee's purchase for his individual account would result in a change of control (such as where purchase of additional shares or units would give him voting control). Renz, 589 F.2d 735; Wooten v. Wooten, 151 F.2d 147 (10th Cir. 1945).

- Whether purchase of the property would enhance the value of other assets, so that purchase by the trustee individually would benefit him and deprive the trust of any such enhancement value. Yu Han Young, 13 Misc. 3d 1232(A).

- Whether the trustee historically engaged in that type of transaction in his individual capacity. Burg, 380 F.2d at 900 and n. 1.

- Whether the offer was made to the trustee in his individual capacity or as fiduciary. Matter of Kelly v. 74 & 76 W. Tremont Ave. Corp., 4 Misc. 2d 533 (Sup. Ct., Bronx Co. 1956), mod. on other grounds sub nom. Procario v. 74 & 76 W. Tremont Ave. Corp., 3 A.D.2d 821 (1st Dep't 1957), aff'd, 3 N.Y.2d 973 (1957).

- Whether knowledge of the opportunity came to the fiduciary as a result of his position as trustee. Burg, 380 F. 2d at 900; Wooten, 151 F.2d at 150; Matter of McCrory Stores Corp., 12 F. Supp. 267 (S.D.N.Y. 1935).

- Whether the fiduciary used or borrowed trust funds to make the purchase. O'Hayer, 30 A.D.2d at 426–27; Burg, 380 F.2d at 901.

- Whether the trustee was authorized by the Will or trust instrument to engage in self-dealing, and/or whether the testator understood that the trustee would simultaneously pursue his own opportunities and, by appointing the trustee, impliedly authorized the conflict. O'Hayer, 30 A.D.2d at 426–27.

A testator may wish to address whether and under what circumstances a manager at the entity level is permitted to take advantage of real estate opportunities that could theoretically be pursued by a trust under his will. Consider these possibilities:

- Acknowledge that the nominated fiduciary owns interests in the same entities and/or different entities in the same or similar business enterprise and state an intention and desire that the fiduciary continue to engage in such activities for his own account.

- Authorize the fiduciary to engage in new or expanded business activities for his own account, even if such activities are in the same line of business or even competitive with the activities of business entities that are owned by the estate or trust.

- Acknowledge that the fiduciary, in his individual capacity, may receive offers or become aware of opportunities for new or expanded investments or activities and express an intention that the fiduciary be free to engage in such activities or make such investments without regard to the interests of the estate or trust.

- Express an intention that the fiduciary continue to pursue his own (individual) business endeavors and opportunities and relieve him from any obligation to make any future endeavors or opportunities available to the estate or trust.

- Express an intention that the usual rules regarding self-dealing shall not apply with respect to the fiduciary.

The above case law makes clear just how important it is to plan for the future operations of the entity and to anticipate potential objections that may arise. The recent case of Matter of Gerlach (Marino), 2017 N.Y. Misc. LEXIS 4142, similarly illustrates some of the conflicts dual-role fiduciaries may face and the protection that well-drafted instruments may provide them. In Gerlach, Decedent held 100% of the stock of three corporations that owned and operated 13 real properties. Decedent's daughter (Daughter) worked with her father in the family business. Decedent's Will left his voting shares to Daughter and his non-voting shares to his two sons, appointed Daughter as executor, and gave her "sole authority to make all decisions concerning [his] corporations." Specifically, Decedent authorized Daughter to retain his business interests and to employ and compensate any person (including herself) as a director, officer, employee or agent of the corporations without regard to whether commissions were also payable.

When it came time for Daughter to account, Decedent's sons filed objections, alleging that Daughter had engaged in self-dealing and had breached her fiduciary duties by compensating herself as manager of the entities while failing to make distributions to them. In rejecting the sons' request for a surcharge, the Surrogate's Court observed that (i) Daughter was expressly authorized by the terms of Decedent's Will to continue his businesses; and (ii)

Daughter was also authorized to receive both commissions and compensation at the entity level and, in fact, had been receiving compensation for managing Decedent's businesses even before his death. As Gerlach demonstrates, appropriate provisions in the governing instrument may protect fiduciaries charged with business operations from attack.

B. Proceedings for Advice and Direction

Where the potential for liability exists, fiduciaries facing conflicts between their roles as executors and trustees and their duties as managers or directors of an entity have the option of commencing a proceeding for advice and direction pursuant to SCPA §2107. Under SCPA §2107, a fiduciary may seek the court's approval of an anticipated transaction and, if it is granted, the fiduciary will be protected from liability. Matter of Benincaso, 2012 N.Y. Misc. LEXIS 58, *14 (Sur. Ct., Nassau Co.).

Note, however, that the court will not generally render advice concerning the entity unless the estate owns 100% of its shares or units, in which case the corporate form can be disregarded. Matter of Weinstein, 25 A.D.2d 776, 776 (2d Dep't 1966) ("Surrogate has discretion to exercise jurisdiction to give advice and direction in the disposition of assets held by the estate through corporations in which decedent had owned all of the shares of capital stock"); Benincaso, 2012 N.Y. Misc. LEXIS 58 at *15, citing Matter of Pulitzer, 139 Misc. 575, 585 (Sur. Ct., New York Co. 1931), opinion supplemented, 140 Misc. 572 (Sur. Ct., New York Co. 1931), aff'd, 237 A.D. 808 (1st Dep't 1932).

C. Accounting Issues

1. Determination of Income

Special considerations arise in connection with accounting for the income of and transactions engaged in by a fiduciary on behalf of an estate or trust that owns real estate entities.

Typically, a real estate entity will enjoy "flow-through" income taxation as a Subchapter S corporation, partnership, or limited liability company. Article 11-A of the EPTL acknowledges the differences between "income" for trust and estate purposes and "taxable income" for income tax purposes in various ways. The rules are generally poorly coordinated, however, and can be ambiguous in application. The basic rules are as follows.

(a) Generally, money received from an entity is allocated to income. EPTL §11-A-4.1. There are exceptions for a distribution (or a series of related distributions) in exchange for part or all of the trust's interest in the entity, and for money received in total or partial liquidation of the entity. EPTL §§11-A-4.1(c)(2) and (c)(3). Money is received in "partial liquidation" (i) to the extent the entity so indicates, or (ii) if the total amount of money and property received is greater than 20% of the entity's gross assets, as shown by its year-end financial statements immediately preceding the initial receipt. EPTL §11-A-4.1(d).

(b) There are separate rules for allocating cash flow received from special types of assets, such as liquidating assets, minerals and other natural resources, and timber. EPTL §§11-A-4.10, -4.11, -4.12.

(c) There are also special rules authorizing transfers from income to principal under limited circumstances. For example, the trustee of a trust holding depreciable real property may under certain circumstances transfer to principal a reasonable amount of net cash receipts from such principal asset that is subject to depreciation. EPTL §11-A-5.3.

(d) Adjustments are also permitted between principal and income on account of income taxes. Under EPTL §11-A-5.6, a fiduciary may make such an adjustment "to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(i) elections and decisions that the fiduciary makes from time to time regarding tax matters;

(ii) an income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(iii) the ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary."

The governing instrument should provide flexibility to the fiduciaries in connection with the application of the above provisions. Consider the following for inclusion in the governing instrument:

- Authorize the fiduciaries to claim debts or expenses of administering the estate on any income or estate tax return and to claim any expenses of administering a qualified revocable trust as deductions from the gross estate.

- Authorize the fiduciaries to make tax elections to produce the optimum reduction in estate tax and capital gains and income taxes, and to elect to defer payment of estate taxes.

- Authorize the fiduciaries to determine whether and to what extent receipts should be deemed income or principal and whether or to what extent expenditures should be charged against principal or income.

- Authorize the fiduciaries, in general, to determine what adjustments should be made between principal and income.

- Authorize the fiduciaries to create and maintain reserves for depreciation of real property, amortization of leaseholds, or other waste with respect to property of the estate or trust, and to set aside and add to principal a portion of the income for any such reserve.

2. Duty to Account for Entity Operations

An executor or trustee may be required to account for the activities of an entity in which the estate or trust has a controlling interest. Matter of Mastroianni, 105 A.D.3d 1136 (3d Dep't 2013) (where trust holds a controlling interest, the trustee can be compelled to account for the actions of the corporation). See also Matter of Sturman, N.Y.L.J., June 9, 1989 at 21, col. 3 (Sur. Ct., New York Co.); Smythe, 6 Misc. 2d at 136.

A fiduciary likewise may be required to account or disclose entity-level information if his personal and fiduciary interests together give him voting control. E.g., Hubbell, 302 N.Y. at 254 (where trustees owned 100% of stock in their individual and fiduciary capacities, they were required to account for the operations of the corporation); Matter of Leogrande, 13 Misc. 3d 1070 (Sur. Ct., Nassau Co. 2006); Matter of Witkind, 167 Misc. 885, 893 (Sur. Ct., New York Co. 1938).

Where the combined holdings of the executor/trustee individually and as fiduciary do not give rise to a controlling interest in the entity, courts may decline to require the fiduciary to account for entity-level transactions. E.g., Witkind, 167 Misc. at 893 ("where an estate has only a minority interest in a corporation the fiduciaries cannot be required to render an account of corporate transactions"). See also Matter of Wainwright, 55 N.Y.S.2d 303, 308 (Sur. Ct., Queens Co. 1945); Matter of Ebbets, 153 Misc. 775 (Sur. Ct., Kings Co. 1934). Furthermore, where a fiduciary holds a controlling interest in the entity in his individual capacity and is therefore not dependent upon the estate's interest to assert control, the fact that that estate also owns an interest may be deemed insufficient to compel the fiduciary to account for his corporate activities. Matter of Sullivan, 169 Misc. 16 (Sur. Ct., Kings Co. 1938), aff'd, 255 A.D. 1008 (2d Dep't 1938). See also, Matter of Liebowitz, 34 A.D.2d 750 (1st Dep't 1970); Matter of Sylvester, 5 A.D.2d 970 (3d Dep't 1958).

There is no required form of accounting for entity-level transactions. As observed by Surrogate Radigan, "[t]he Surrogate's Court does not ordinarily require an executor's accounting to set forth extended and detailed operations of a business or corporation wholly owned by the decedent, leaving it to the beneficiaries to obtain more detailed explanations if sought." Matter of Spina, N.Y.L.J., Jan. 28, 1998 at 3, col. 1 (Sur. Ct., Nassau Co.). Upon request, the fiduciary may be required to provide the beneficiaries with such entity-level information as financial statements and tax returns. E.g., Mastroianni, 105 A.D.3d 1136; Matter of Fischer, N.Y.L.J., Apr. 2, 2001 at 24, col. 6 (Sur. Ct., New York Co.); Matter of Sturman, N.Y.L.J., June 9, 1989 at 21, col. 3 (Sur. Ct., New York Co.). Fiduciaries may also be required to be examined concerning the entity's operations. E.g., Matter of Luce, 230 N.Y.S.2d 45 (2d Dep't 1962); Matter of Shehan, 285 A.D. 785 (4th Dep't 1955); Matter of Rappaport, 96 N.Y.S.2d 741 (Sur. Ct., Kings Co. 1950); Matter of Barrett, 168 Misc. 937 (Sur. Ct., New York Co. 1938).

Counsel should keep in mind, when faced with a demand for information or documentation concerning an entity's operations, whether the estate or trust's ownership interest in the entity and/or the fiduciary's role therein warrants such an investigation by the beneficiaries.

Conclusion

The dual-role fiduciary must carefully navigate his dual obligations: to the beneficiaries of the estate or trust and, in some cases, to the other partners of the business entities. The cases cited above provide reasonable guidelines, however. Combined with an instrument drafted to provide sufficient flexibility and with an eye towards the conflicts the fiduciary is likely to face under the circumstances at hand, such a fiduciary may embark on the

task of administering the estate or trust with at least some assurance that he will be able to manage the dual roles.

Protecting the Property

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NEW YORK STATE BAR ASSOCIATION
TRUSTS AND ESTATES SECTION
FALL MEETING 2018

PROTECTING THE HOME:

THE USE OF IRREVOCABLE TRUSTS FOR ASSET PROTECTION AND MEDICAID PLANNING

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ASSET PROTECTION PLANNING FOR THE HOME

Typical Client Scenario:

Your client, Mrs. Bunker, is 78 years old and in good health. She is a widow with two children. Her assets consist of her home valued at $600,000 with no mortgage; an IRA Rollover from her husband of $240,000; $80,000 in stocks that she inherited from her father 30 years ago; and $100,000 in various bank accounts. She has Medicare, a Medicare Supplemental Insurance Policy and Medicare Part D. She does not have Long Term Care insurance. Her best friend recently went into a nursing home and is going through her life savings and her family sold her home to pay for her care. Mrs. Bunker does not want this to happen to her, and she particularly wants to leave her home to her children and grandchildren as an inheritance. She tells you that another neighbor transferred her home to her children. She asks you what she should do to protect her home.

- What will happen to the home if Mrs. Bunker applies for Medicaid for home care services?
- What will happen to the home if Mrs. Bunker applies for Medicaid for nursing home care?
- What are the consequences of transferring the home to Mrs. Bunker's children outright?
- What are the consequences if the home is transferred to Mrs. Bunker's children subject to a reserved life estate?
- What are the consequences if the house is transferred to a revocable trust?
- What are the consequences if the house is transferred to an irrevocable trust?

I. INTRODUCTION

An experienced elder law attorney will generally advise the client that the best option for protecting the house against expensive long term care costs is to transfer the house to an Irrevocable Trust. Irrevocable Trusts are often used in planning to protect a home from Medicaid claims. These trusts are particularly useful to protect the client's home, often the client's largest asset, but they can also be used to protect other assets. Typically, the Irrevocable Trust will provide that the client, who is the Grantor of the trust, retains the right to receive income from trust assets and the exclusive lifetime right of use and possession of the home. The drafter of the trust must carefully consider numerous issues when drafting the trust, including estate, income, gift and property tax consequences of the trust.

II. GENERAL AND DEBTOR CREDITOR PROVISIONS RELATING TO TRANSFERS AND TRUSTS

A full discussion of debtor-creditor law is beyond the scope of this outline, which focuses on the use of Irrevocable Trusts in the Medicaid planning context. However, estate planners should have a general knowledge of the salient provisions of New York regarding the ability of a court to invade the principal of a trust to satisfy the creditors of the creator.

A. Revocable Trusts have no creditor protection as they are fully available to the Grantor.

B. Unless otherwise provided in the governing instrument, a court may in its discretion award principal from a trust for the benefit of an income beneficiary whose support or education is not sufficiently provided for, if the other adult and competent beneficiaries so consent, or upon a hearing on notice to all of the other beneficiaries, if the court is satisfied that the original purpose of the creator of the trust cannot be carried out and the invasion effectuates the intent of the creator. E.P.T.L. §7-1.6.

C. A transfer of assets to an Irrevocable Trust will generally be made without fair consideration. Debtor Creditor Law §273 provides that "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent, is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

D. Debtor Creditor Law §270 defines a "creditor" as a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

E. Pursuant to Debtor Creditor Law §274, a conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to actual intent.

F. Pursuant to Debtor Creditor Law §275, every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

G. Pursuant to Debtor Creditor Law §276, every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors is fraudulent as to both present and future creditors.

H. If a conveyance is found to be fraudulent, the creditor, bankruptcy receiver, or trustee may be entitled to recover reasonable fees for the proceeding to set aside the conveyance. Debtor Creditor Law §276-a.

I. Prior to the enactment of federal and New York State legislation imposing specific penalties for individuals who transfer assets prior to submission of Medicaid applications, there were a few decisions by New York courts holding that a transfer of assets by an elderly individual who later applied for Medicaid might violate fraudulent conveyance laws. See, Crabb v. Mager, 66 A.D.2d 20, 412 N.Y.S. 2d 508 (4th Dept. 1979) which upheld a denial of a motion to dismiss for failure to state a cause of action in a fraudulent conveyance proceeding commenced by a local department of social services commenced against the estate of an individual and her

son and daughter-in-law to whom the individual transferred her home prior to entering a nursing home. See also, Bandas v. Emperor, 121 Misc.2d 192, 467 N.Y.S.2d 749 (Sup. Ct. Cayuga Co. 1983) in which the Court denied a motion to dismiss an action to set aside a transfer at a time when there were no New York statutes in effect prohibiting transfers of assets by individuals who applied for Medicaid. Subsequent to enactment of the federal transfer of asset provisions contained in the Omnibus Medicaid Reconciliation Act of 1993 and New York's implementing legislation discussed below, no New York court has set aside a transfer of assets to an irrevocable trust by an individual who subsequently applied for Medicaid as a fraudulent conveyance. In the opinion of the author, the enactment of federal and New York State legislation specifically addressing the effect of transfers of assets upon Medicaid eligibility has pre-empted the field and prohibits states from utilizing fraudulent conveyance statutes to invade assets placed into trusts. See, "In Defense of Medicaid Planning: Federal Law Prohibits States From Applying Debtor-Creditor Laws to Asset Transfers" by Frances M. Pantaleo and Robert M. Freedman, NAELA Quarterly, Volume 7, Number 4, Fall 1994.

III. MEDICAID ELIGIBILITY AND TRANSFER RULES

A. Financial eligibility for Medicaid services is based upon review of both the income and resources of the applying individual or family. The income and resource thresholds are revised annually.

B. Income:

i. In 2018, the **maximum monthly income** for an individual receiving Medicaid services in the home is $842. For a couple, the monthly income allowance is $1,233 if both will be receiving Medicaid services.

ii. Individuals in the community who have income in excess of the permitted allowance can "spend down" their surplus income on medical care or deposit surplus income into a "pooled income trust" managed by a not for profit agency.

iii. If receiving Medicaid payments for a nursing home, a single Medicaid recipient may only keep $50 per month of income and all income over this allowance must be paid to the nursing home.

iv. Married individuals who are receiving Medicaid in a nursing home can divert a portion of their income to a spouse living in the community, if the spouse has monthly income of less than $3,090.

v. The Medicaid program budgets gross income, with no deductions for income taxes. However, deductions are permitted for health insurance premiums.

C. Resources:

i. In 2018, a single individual is permitted to have $15,150 in countable assets. A couple may have combined countable assets of $22,200.

ii. **Exempt assets** include:

1. a pre-paid irrevocable burial contract of any amount
2. burial space items (such as a plot or tombstone)
3. a burial fund of $1,500 (unless the pre-paid contract includes payment of more than $1,500 for non-burial space items)
4. qualified retirement accounts such as IRA, 401k and 403b accounts, however these accounts must be placed into "periodic payment status" and the income so distributed will be budgeted as income.
5. a primary residence if it has an equity value of less than $858,000 (2018.)

iii. Although the home is generally an exempt asset, the Medicaid program has a **right of recovery** from the probate estate for the full value of Medicaid provided to the decedent on or after the decedent's 55th birthday. The Medicaid program will be a preferred creditor of the estate, with priority over the rights of ordinary creditors. No recovery may be made if the recipient has a **s**urviving spouse, or if the recipient has a child who is under the age of 21 or certified blind or disabled. Social Services Law §369.

iv. If the Medicaid recipient is in a nursing home, the Medicaid program has the right to place a **lien** against the home. However, no lien may be imposed if the home is occupied by a spouse, a child under the age of 21, a certified blind or disabled child or a sibling with an equity interest in the home who has lived in the home for at least one year prior to the institutionalization of the Medicaid recipient. Social Services Law §369.

v. Assets over the exemption must be spent down on medical care unless there are grounds for exempt transfers, discussed below.

D. Transfers of Assets:

i. **Sources of law**: 42 U.S.C. §1396(p); Social Services Law §366; 18 N.Y.C.R.R. 360-4.6; O6 OMM/ADM-5.

ii. Transfers of assets during the sixty month period prior to the submission of an application for Medicaid payments for institutional (i.e., nursing home) care (the "**look-back period**") will cause a period of Medicaid disqualification for payments for nursing home care ("**penalty period**") unless the transfer falls within certain exempt categories discussed below.

iii. The penalty period is calculated by aggregating all non-exempt transfers of assets during the look-back period and dividing the result by the "**regional rate"** which represents the average cost to the Medicaid program for a Medicaid bed in a nursing home in the region. The regional rates are updated annually. In 2018, the rates range from a low of $9,722 to a high of $13,053.

iv. The transfer penalty does not apply to individuals who apply for community (home care) Medicaid services. However, many of these individuals may be at risk of placement into a nursing home within 60 months. Individuals who ask to convert from community Medicaid to institutional Medicaid will be

asked to provide documentation regarding transfer of assets during the look-back period.

v. **Exemptions from transfer penalties:** The primary residence may be transferred without penalty to a spouse, a child under 21, a blind or disabled child, a sibling with an equity interest in the home who has resided in the home with the Medicaid applicant for at least one year immediately prior to the institutionalization of the Medicaid applicant and to a "caretaker child" who has resided with the Medicaid applicant for at least two years immediately prior to institutionalization of the Medicaid applicant.

vi. Interspousal transfers of assets are frequently used to obtain immediate Medicaid eligibility if one spouse becomes ill and requires expensive long term care. However, the assets of the non-applying "well spouse" must be disclosed to the Medicaid program and the well spouse must submit a **spousal refusal statement** in order to prevent the transferred assets from being counted as available assets of the ill spouse. The spouse who executes the spousal refusal runs the risk that he or she may be sued for support by the local Medicaid agency. A discussion of spousal refusal strategies and protections is beyond the scope of this outline. However it is important to understand that although the spousal refusal strategy may protect the assets against the illness of one spouse, it will not protect the assets if the second spouse subsequently requires expensive long term care.

vii. **Transfers of assets to an Irrevocable Medicaid Trust** will generally result in a 60 month period of ineligibility for institutional Medicaid. The transfer penalty will apply to both spouses, even if the transfers are made by only one of spouse. Therefore, such trusts are most appropriate for clients who are young and healthy enough that they do not anticipate needing Medicaid coverage of institutional care for five years or who retain sufficient assets outside of the trust to pay for medical and ordinary living expenses for at least five years.

IV. IRREVOCABLE MEDICAID TRUSTS

A. Introduction:

Irrevocable Trusts are attractive to clients and their families since they provide income and the right to remain in the home, but protect the corpus of the trust for the clients' beneficiaries.

B. Medicaid treatment of Trust Income:

Any income which could be payable to the Grantor under the terms of the trust will counted as available to the Grantor for the purpose of determining Medicaid eligibility. The Department of Social Services is entitled to count as available to the Grantor any income or principal which the trustee has discretion to pay to or for the benefit of the Grantor, regardless of whether the trustee actually exercises that discretion. 18 NYCRR §360-4.5 (b) (1) (ii).

i. **Drafting Tip:** The trust should include language that the trustees do not have the power to adjust under E.P.T.L. §11-2.3(b) (5) A.

ii. **Drafting Tip**: The Grantor can specify how "income" is defined. Ordinarily, the Grantor will want the trustees to have unilateral discretion regarding the investment of trust assets and the authority to direct investments towards growth rather than income. Therefore, most trusts should specify that the trustee shall not have the power to elect unitrust provisions under EPTL §11-2.4. However, if the Grantor is concerned about losing control of the corpus of the assets transferred to the trust or wants to maximize income distributions, the trust could define income as an annuity payment greater than actual trust income or could require the trustee to elect the unitrust status.

iii. Most practitioners draft the trust to require that all income be paid to the Grantor in order to assure that the value of the trust will be includable in the Grantor's taxable estate. (See tax discussion below.) If the trust requires the distribution of income to the Grantor and this income is not actually distributed to the Grantor during the "look-back period", the Medicaid program may budget the undistributed income as available to the Grantor or assess a transfer penalty for the Grantor's failure to demand payment of such income.

C. Medicaid Treatment of Trust Principal:

i. The Irrevocable Medicaid Trust must state that the trustees may not distribute or apply the principal of the trust to the Grantor under any circumstances, thus making the principal unavailable for the purpose of Medicaid eligibility. If the trustee is given any discretion to pay principal to or for the benefit of the Grantor, then the trust principal will be counted as an available resource of the Grantor. 18 N.Y.C.R.R. §360-4.5 (b) (1) (ii).

ii. Since E.P.T.L. §7-6.1 allows the invasion of trust corpus for the benefit of an income beneficiary, the Irrevocable Medicaid Trust should contain a provision explicitly stating that E.P.T.L. §7-6.1 shall not apply.

iii. **Trigger Trusts**: If the trust limits, suspends or diverts income or principal upon a trigger such as an aplication for Medicaid, placement of the Grantor into a nursing home, or disability of a Grantor, the provision is void as against public policy and the trigger will be ignored in determining whether the trust income or principal will be considered available to the Medicaid applicant. E.P.T.L. §7-3.1(c); 18 N.Y.C.R.R. §360.4.5(a), 96 ADM 8.

iv. It is generally advisable that the trust contain provisions permitting the trustees to make distributions of principal to a class of beneficiaries during the lifetime of the Grantor. This power will give the trustees the ability to get funds out of the trust for the benefit of the Grantors, if they choose to do so, as well as provide a mechanism to get funds out of the trust for the beneficiaries if the Grantor truly doesn't need the funds. However, the Grantor must be made aware that he or she will have no right to compel the trustees or any

beneficiary to take distributions from the trust to be used for the Grantor. Moreover, the drafter should be aware of E.P.T.L. §10-10.1 which provides that the authority of a trustee to make discretionary distributions to herself is limited to distributions for health, education, welfare and support unless the language of the trust specifically grants the trustee unlimited discretion. Moreover, as most drafters will want to avoid giving the trustee a general power of appointment over the trust, the better practice is to name at least two trustees so that fully discretionary distributions to a trustee can be made by the co-trustee.

v. The trust should not include language which would permit the trustees to pay burial expenses of the Grantor upon the Grantor's death as some local departments of social services have deemed this as giving the Grantor a power to receive principal of the trust, thereby making at least a portion of the trust corpus available to the Grantor.

V. REVOCABLE TRUSTS AND MEDICAID

A. Revocable trusts will be counted as fully available to the Medicaid recipient. Therefore, they do not protect cash or securities from exposure to long term care costs.

B. There are numerous Medicaid fair hearing decisions which have held that a transfer of a home to a revocable trust will not cause an otherwise exempt residence to be a countable asset, although there are reports that some local social services districts will deny Medicaid eligibility if a residence is held in a revocable trust.

C. A home held by a revocable trust will not be subject to Medicaid estate recovery as the asset will pass outside of probate. However, the residence will be subject to a Medicaid lien if the Grantor receives Medicaid payments for nursing home care. Moreover, if sold during the lifetime of the Grantor, the proceeds from the sale will become fully available and cause disqualification of the Grantor.

VI. TAX CONSIDERATIONS

A. Gift Tax Considerations:

i. A transfer to an irrevocable trust is ordinarily a completed gift that is subject to federal estate and gift tax reporting rules. With the Uniform Credit now in excess of $11 million and the New York State estate tax exemption in excess of $5 million, few individuals who are concerned about paying for the cost of long term care will need to be concerned about paying a gift tax for assets transferred to an Irrevocable Medicaid Trust. However, if the gift is complete, a gift tax return must be filed.

ii. If the Grantor wants to avoid the requirement to file a gift tax return, or there are other reasons to make the gift incomplete, the Grantor should retain a Special Power of Appointment. See sample Power of Appointment provisions appended at the end of this article and discussion below.

B. Estate Tax Considerations:

If the Grantor has retained the right to receive all income from the Trust, the entire value of the trust at the date of death will be included in the Grantor's taxable estate. I.R.C. §2036.

C. Tax Basis Considerations/Step-Up in Basis:

i. The Grantor will generally want to structure the assets in the trust to qualify for a step-up in basis upon the Grantor's death. I.R.C. §1014(a) provides that the basis of property ***acquired from a decedent*** is the fair market value at the time of the decedent's death. Subsection (b) provides that property acquired from a decedent includes property required to be included in determining the value of the decedent's gross estate for estate tax purposes.

ii. I.R.C. § 2036 defines a gross estate as including the value of all property of which the decedent has at any time made a transfer by trust or otherwise under which the decedent had retained for his life:

1. the right to possession, enjoyment or income from the property (such as a continuing income interest in trust or a life estate, or
2. the right, either alone or in conjunction with another person, to designate the persons who shall possess, enjoy or obtain income from the property (i.e. power of appointment).

D. Income Tax Considerations/Grantor Trust Rules:

i. The Grantor will generally want one or more of the **Grantor Trust Rules** found at I.R.C. §§ 671-677 to apply to the trust so the trust is:

1. taxed as if the property is owned by the Grantor and not by the trust itself as trusts are generally taxed at significantly higher (i.e. more compressed) income tax brackets than an individual, and is
2. entitled to favorable capital gains tax treatment upon the sale of the residence so that the trust is taxed as if the property were owned directly by the Grantor. I.R.C. §121.

ii. When qualifying the trust as a Grantor Trust, the drafting attorney must take into consideration the impact on the Grantor's Medicaid eligibility.

iii. The **Grantor Trust Rules** apply and the Grantor is deemed owner of trust for tax purposes if one of the following I.R.C. provisions apply:

1. **§673:** The Grantor is the owner of reversionary interest in income or corpus. However, giving the Grantor a reversionary right to principal would render the Grantor ineligible for Medicaid.
2. **§674:** The Grantor is the owner of a power to change the beneficiaries of the trust (i.e. **special power of appointment**). This power can also be owned by a non-adverse party or both. This causes a step-up in basis pursuant to I.R.C. §§ 1014 and 2036 which provide a

step-up in basis for property in trust over which a decedent, either alone or in conjunction with another person, possesses a power of appointment. The power of appointment maybe exercised by a lifetime instrument or by Will. A lifetime power of appointment over principal will cause the capital gains to be taxed to the Grantor. I.R.C. 674(a). A testamentary power of appointment over the principal will cause capital gains to be taxed to the Grantor if they are accumulated and added to the principal. I.R.C. §674(b).

a. Clients like the power of appointment as it allows them to retain control over the ultimate disposition of trust assets. Children can still be disinherited, the class of beneficiaries can be enlarged and assets can be left in trust rather than outright to beneficiaries who subsequently develop creditor or marital troubles, or have special needs.

b. The special power of appointment can be useful if the Grantor needs to revoke the trust because of an unexpected illness, need for trust assets and/or inability to get through the five year look-back period. See discussion of revocability of irrevocable trusts below.

3. **§675:** The Grantor has excessive administrative control that is exercisable for the benefit of the Grantor rather than the beneficiaries. Specifically, consider utilizing §675(4) (C) which treats the Grantor as owner if the Grantor has power to reacquire the trust corpus by substituting other property of an equivalent value, without the approval or consent of another person in a fiduciary capacity. This power should be sufficient to cause capital gains to be taxed to the Grantor. However, it does not alone cause estate tax inclusion required for the step-up in basis. For this, the trust must either require that all income be paid to the Grantor or give the Grantor other powers over income.

a. **WARNING**: Will the power to substitute property of equivalent value cause a problem with the Grantor's eligibility for Medicaid? The author is not aware of any fair hearing decisions or cases in NY State which have held trust assets to be available due to the Grantor's retention of this power. However, fair hearing decisions in Florida and other states have held that the substitution power makes the trust an available resource.

4. **§676:** The Grantor has the power to revoke the trust. This will cause the trust property to be available to the Grantor and countable for the purpose of the Grantor's Medicaid eligibility. See discussion of Revocable Trusts above.

5. **§677**: The Grantor has power to distribute income to himself or spouse. This will only give Grantor Trust status over income and not

principal (i.e. corpus) which is insufficient for §121 treatment regarding the sale of the residence since it is not a power over corpus.

E. Capital Gains Considerations upon Sale of Residence:

i. A major tax consideration is I.R.C. §121 which provides a $250,000.00 exclusion of gain ($500,000.00 for married couples filing a joint return) for a taxpayer who owns and occupies a principal residence for two of the last five years immediately preceding the date of sale. The exclusion is increased to $500,000 in the case of a sale or exchange of property by an unmarried individual whose spouse is deceased on the date of such sale, if such sale occurs within two years after the date of death of such spouse and the requirements of the exclusion were met immediately before such date of death. The exclusion applies regardless of age. The exclusion can be used once every two years, but indefinitely.

ii. **PRACTICE TIP**: If the Grantor retains the right to trust income and both a lifetime and testamentary special power of appointment over principal of the trust, he will achieve §121 capital gains tax benefits while preserving the protection of the trust assets from being considered available assets by the Medicaid program. The power of appointment should be testamentary as well as lifetime to avoid a potential IRS claim that the trust is akin to a life estate and thus (like a life estate) the proceeds from the sale of the residence should only receive favorable capital gains treatment as to the portion allocable to the life interest.

iii. In **Verdow v. Sutkowsky**, 209 F.R.D. 309 (N.D.N.Y., 2002), the Northern District Federal Court ruled that the retention of a power of appointment by the Grantor of an irrevocable trust did not render the trust an available resource for Medicaid eligibility. This decision has been followed in New York although other states report that the inclusion of the power of appointment will cause the trust corpus to be deemed an available resource.

iv. Some commentators have expressed concerns that lifetime powers of appointment may create potential title problems. However, in the experience of the author, if the lifetime power is drafted to require receipt by the trustee of the document exercising the power, title companies do not have a problem with the existence of the lifetime power of appointment in the document or accept a written statement by the trustees that they have not received exercise of the power of appointment.

F. Property Tax Considerations:

i. If the Grantor has retained the obligation to pay taxes related to the residence and the exclusive right to use and occupancy of the residence held by the trust, the Grantor will retain eligibility for any Senior Citizen, Enhanced Star and Veteran's exemptions which apply to the property.

VII. ADVANTAGES OF THE IRREVOCABLE TRUST OVER OUTRIGHT GIFT

A. The Grantor may keep income for support and independence.

B. The transfer to the trust is not a completed gift if the Grantor retains a special power of appointment.

C. The beneficiaries receive trust assets with a step-up in basis upon death of the Grantor.

D. Capital gains taxes can be avoided if the home is sold during the lifetime of Grantor.

E. The trust income will be taxed to the Grantor if the trust qualifies as a Grantor trust. This can extend to capital gains if the trust qualifies as a Grantor trust over income and principal.

F. The trust funds are legally segregated. This protects them from a number of potential problems compared to the outright gift, including:

i. Claims by creditors of the donees.

ii. Divorce of a donee. (Regardless of whether the spouse has a claim against the gifted property, it can and will often be an issue in the divorce.)

iii. Death of the donee. The property will stay in the trust to be distributed to the Grantor's designated beneficiaries rather than to the beneficiaries of the donee's estate.

iv. Malfeasance of the donee.

VIII. ADVANTAGES OF THE IRREVOCABLE TRUST OVER THE TRANSFER OF THE HOME BY DEED WITH A RETAINED LIFE ESTATE:

A. If using an Irrevocable Medicaid Trust to protect a home, the client should also weigh the advantages and disadvantages of transferring the home into the trust as contrasted with transferring the home by a deed with a retained life estate. Both options have the advantages of providing the Grantor use and some degree of control over the home during lifetime and step-up in basis upon the death of the Grantor.

B. The transfer of the home into the Irrevocable Medicaid Trust is not a present gift subject to gift taxes if the Grantor retains a special power of appointment. If the home is transferred with a reserved life estate, the gift of the remainder interest is a present gift. A special power of appointment contained in a trust will generally not create a title problems whereas the reservation of a power of appointment in a deed generally does.

C. The Medicaid Trust can give the Grantor the sole authority to determine whether the residence can be sold during the Grantor's lifetime. If the property is sold during the lifetime of the Grantor:

i. The trust can be drafted to require that the entire proceeds of the sale remain in the trust for the lifetime of the Grantor. If property subject to a life estate is sold, a portion of the proceeds will be distributed to the holders of the

remainder interest and a portion of the proceeds must be distributed to the life tenant, thereby exposing the life tenant's portion to exposure to pay for long term care needs.

1. The Medicaid program values the life estate by determining the 7520 rate in effect at the time of the sale of the residence and determining the value of the life and remainder interests under the IRS Table S, Single Life Tables.
2. In September 2018 when this outline was drafted, the value of a life estate of an individual who is 85 years old is .17890 of the property. For a residence sold for a net sales price of $600,000, this would amount to $107,340 being paid to the life tenant, which would cause the life tenant to lose Medicaid eligibility.

ii. If the residence held by a trust is sold, the trust is generally drafted to permit the purchase of a new residence which remains in trust ownership and will continue to be an exempt resource for Medicaid qualification purposes.

iii. The trust can be drafted to qualify for favorable income tax treatment of the capital gains including qualifying the entire purchase price for §121 treatment. With a retained life estate, the retained life estate would qualify for §121 treatment, but the remainder interest would not, unless the holder of the remainder interest had owned and lived in the home for two of the last five years.

IX. DISADVANTAGES OF IRREVOCABLE MEDICAID TRUST COMPARED TO A TRANSFER OF THE HOME WITH A RETAINED LIFE ESTATE:

A. The trust is more complicated.

B. The trust is more expensive to create and administer.

C. The penalty period of ineligibility for Institutional (Nursing Home) Medicaid may be longer since it is based upon the total value of the home rather than the value of the home minus the value of the retained life estate. However, since the implementation of the Deficit Reduction Act which changed the calculation of penalty periods for transfers of assets, in most cases, the creator will not be able to apply for institutional Medicaid for 60 months anyway.

X. OOPS! WE MADE A MISTAKE. WHAT IF CIRCUMSTANCES CHANGE? CAN AN IRREVOCABLE TRUST BE CHANGED OR REVOKED?

A. The loss of control over assets is one of the biggest barriers to clients who consider transfer of assets to an irrevocable trust. This is partly a psychological barrier but clients are rightly concerned that without a crystal ball, it may be impossible to know for certain that they may not want to sell their home in the future, suffer an unexpected health crisis such as a stroke or want the return of trust corpus.

B. If the Grantor desires only the ability to change the beneficiaries who will inherit the trust upon the Grantor's death, this can be accomplished by giving the Grantor the special power of appointment.

C. If the Grantor needs to revoke the trust due to need to access trust principal to pay for care as a result of unanticipated nursing home placement before the look-back period expires, the Grantor and the trust beneficiaries can utilize the provisions of E.P.T.L.§7-1.9(a) which permits the Grantor of an irrevocable trust to revoke the trust "Upon the written consent, acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property, of all the persons beneficially interested in (the) trust."

D. If the conveyance or other instrument creating the trust was recorded, the instrument revoking or amending the trust together with the consents thereto, shall also be recorded. E.P.T.L. §7-1.9(b).

E. If the trust provides for distribution to the issue per stirpes of the Grantor, and this class of beneficiaries includes minors, the trust may not be revoked even if the minor's parent is alive and the minor will not inherit unless the parent dies before the Grantor. Whittemore v. Equitable Trust Co. of New York, 250 N.Y.298 (1929) A guardian of the property of the infant cannot consent to revocation on behalf of the infant. Application of Michael, 70 Misc.2d 301; aff'd, 39 A.D.2d 865.

F. Inclusion of a lifetime power of appointment provides the Grantor with a simple way to assure that the trust can be revoked in the future if there is a drastic change in circumstance. The Grantor can execute an acknowledged document which exercises the power of appointment by eliminating any and all beneficiaries who would not agree to revoke the trust, or are not legally able to do so. Once the exercise of the power of appointment has been accomplished, the Grantor and the remaining trust beneficiaries can revoke the trust and return all trust assets to the Grantor.

G. In order to assure that the trust can be revoked if the Grantor becomes incapacitated, the Grantor should sign a power of attorney which includes specific authority for the agent to modify, amend or revoke any trusts created by the Grantor. See, Matter of Perosi v. LiGreci, 98 A.D.3d 230 (2nd Dept. 2012) which upheld a modification of a trust by an agent under power of attorney.

H. If the Grantor has only retained a testamentary power of appointment, and the Grantor has capacity, the Grantor could write a Will which eliminates minor or problematic beneficiaries and then revoke the trust with the consent of the remaining beneficiaries. However, this will not be possible if the Grantor lacks capacity. Moreover, will this cause title problems if the residence needs to be sold? How can a title company be certain that the Grantor's Will exercising the power of appointment is valid?

XI. JOINT TRUSTS FOR A MARRIED COUPLE OR SEPARATE TRUSTS?

A. When the estate and gift tax exemptions were much lower, most attorneys would split the assets of married couples and create separate irrevocable trusts for each spouse.

One-half of the marital residence would generally be deeded to each trust, although if one spouse was expected to die sooner than the other, the entire residence might be transferred to a trust in the name of that spouse in order to take advantage of the step-up in basis upon death if the residence was likely to be sold upon the first spouse's death.

B. With the increases in both the New York and federal estate tax exemptions, many practitioners are moving towards greater use of joint irrevocable trusts. However, the drafting of these trusts is considerably more complicated. Considerations will include whether the trust will become irrevocable upon the death of one spouse. Additionally, should both spouses be given a special power of appointment? Which will control if both are exercised?

SAMPLE TRUST PROVISIONS

ARTICLE II - DISPOSITIVE PROVISIONS DURING THE LIFE OF GRANTOR

The trustees shall hold, manage, invest and reinvest the assets of the trust, collect and receive the income therefrom and the trustees shall distribute, apply and/or accumulate the net income and principal of the trust in the following manner:

Income

(A) The trustees, after paying all proper charges, expenses, and commissions related to the administration of the trust, and the maintenance and repair of the property contained therein, shall pay over, in at least quarter-annual installments, the entire net income of the trust to or for the benefit of the Grantor for so long as the Grantor shall survive, thereafter, all income not so distributed shall be accumulated by the trustees, which income shall become a part of the principal of the trust and be distributed in accordance with the terms and conditions set forth in Article III herein.

Principal

(B) During the lifetime of the Grantor, the trustees shall have the discretion to pay to or apply for the benefit of **SON OF GRANTOR, DAUGHTER OF GRANTOR,** their spouses and their issue (such individuals hereinafter being referred to individually as "Lifetime Beneficiary" or collectively as "Lifetime Beneficiaries"), so much of the principal of the trust, as the trustees, in their sole and absolute discretion, deem necessary or appropriate. [1]

[1] Depending upon what is known about family dynamics, the net worth of the trustees or the wishes of the Grantor, the discretion of the trustees to make distributions of principal during the lifetime of the Grantor may be limited by an ascertainable standard, or require equal distributions among the class of permitted distributees. However, in most instances, trusts drafted by author provide the trustees with unlimited discretion over distributions from the trust during the lifetime of the Grantor, subject however, to the limitations discussed below.

Waiver of Provisions of Principal and Income Act

(C) The Grantor expressly waives the application of the terms and conditions of Section 11-2.3 (b) (5) of the Estates Powers and Trusts Law of the State of New York to the extent the provisions of such statute are applicable to this trust. The trustees shall not make an adjustment between principal and income pursuant to the provisions of the aforesaid law. Furthermore, no Court or Administrative agency may compel the trustees to make an adjustment between income and principal.

(D) The Grantor expressly waives the application of the terms and conditions of Section 11-2.4 of the Estates Powers and Trusts Law of the State of New York. The trustees shall not elect unitrust status for this trust pursuant to the aforesaid law to the extent the provisions of said statute are applicable to this trust. Furthermore, no Court or Administrative agency may compel the trustees to elect unitrust status for this trust. The trustees shall have the sole discretion regarding the investment of trust assets even if said investment decisions reduce the annual income payable to the Grantor.

Limitations on Trustee-Beneficiary

(E) Notwithstanding anything herein to the contrary, any distribution of principal of the trust to or for the benefit of a trustee who is also a beneficiary hereunder may only be made in the sole and absolute discretion of another trustee then acting hereunder. Furthermore, each other right, power, duty or discretion of any individual trustee who is also a beneficiary hereunder shall be deemed limited as necessary so that no right, power, duty or discretion conferred upon such trustee under this Agreement can be construed to be a general power of appointment under Section 2041 of the Internal Revenue Code of 1986, as amended, which would cause any assets of the trust to be included in the estate of said Trustee-Beneficiary at

death. Any such right, power, duty or discretion which cannot be so limited shall be deemed null and void with respect to said Trustee-Beneficiary.

Manner of Distributions

(F) The aforementioned distributions of principal from the trust may be made by the trustees without reference to the financial resources which are or might be made available to the Lifetime Beneficiaries from other sources and without regard to the duty of any person to support the Lifetime Beneficiaries. Said distributions need not be distributed equally among the Lifetime Beneficiaries. The trustees shall have no discretion or authority to make any such distributions of principal to the Grantor during the Grantor's lifetime.[2]

ARTICLE III - DISPOSITIVE PROVISIONS FOLLOWING DEATH OF GRANTOR

(A) Upon the death of the Grantor, the trustees shall pay first from the income of the trust, and if the income of the trust is insufficient, then from the principal of the trust:

(1) all estate, inheritance and/or other death taxes of any kind which shall be assessed as a result of the Grantor's death with respect to all items included in the computation of such taxes, which pass under this Trust Agreement;

(2) all other administration expenses of the trust. [3]

(B) After the trustees have paid all of the taxes, expenses, and other costs referenced in the preceding subsection (A) hereof, all income of the trust not yet disbursed or otherwise distributed as heretofore directed shall be accumulated, added to and become a part of the

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[2] (NOTE: Some practitioners require that distributions to or among the lifetime beneficiaries be made in equal amounts to all of the lifetime beneficiaries unless all or a majority consent to the unequal distribution.)

[3] The Trust should NOT permit the Trustees to pay burial expenses of the Grantor, as some Departments of Social Services have held this to be a reservation of a right to principal by the Grantor, thereby causing a portion of the trust to be treated as an available assets to the Grantor.

principal of the trust (hereinafter collectively referred to as the "Trust Property"). The trustees shall continue to hold, pay over and distribute the Trust Property to such persons and in such proportions, in further trust or otherwise, in fee or lesser estates as the Grantor by either a lifetime instrument or the Grantor's Last Will and Testament duly admitted to probate may validly appoint, which lifetime and testamentary powers of appointment are specifically limited as set forth in Article V hereof.

Dispositive Provisions Regarding Remaining Trust Property

If the Grantor shall fail to exercise the lifetime or testamentary powers of appointment set forth in Article III paragraph (B) and Article V, and at least sixty (60) days have elapsed since the death of the Grantor, the trustees shall distribute the rest, remainder and residue of any trust property to the then surviving issue, *per stirpes*, of the Grantor.

ARTICLE V-
RESERVATION OF POWER OF APPOINTMENT BY GRANTOR

(A) **Lifetime Limited Power of Appointment**: The Grantor reserves the power, exercisable by written instrument, executed by the Grantor, duly acknowledged and delivered to the Trustees during the Grantor's lifetime expressly referencing this power, to appoint any part or all of the principal or income of the Trust, outright or upon Trusts, conditions or limitations, to or among a class of beneficiaries limited to Grantor's children, grandchildren and relatives by blood or marriage and any charitable organization other than governmental entities or any federal, state or local subdivision, department or agency thereof. No exercise of this power shall exhaust it. No such appointment shall be made to the Grantor, the Grantor's creditors, the Grantor's estate or the creditors of the Grantor's estate. The power reserved to the Grantor under this paragraph may be exercised by a duly appointed agent under power of attorney of the Grantor provided that

the authority to exercise the power is contained in the power of attorney or by a conservator, committee or guardian of the Grantor, provided that the authority to exercise such power is granted by a court of law.

(B) **Testamentary Limited Power of Appointment:** The Grantor reserves the power, exercisable by the Grantor's Will or any codicil thereto, to appoint any part or all of the principal or income of the Trust, outright or upon Trusts, conditions or limitations, to or among a class of beneficiaries limited to Grantor's children, grandchildren, relatives by blood, marriage or adoption and charitable organizations other than governmental entities or any federal state or local subdivision or agency thereof. No such appointment shall be made to the Grantor, the Grantor's creditors, the Grantor's estate or the creditors of the Grantor's estate. This limited power of appointment may only be exercised by a Will of the Grantor which must be submitted for probate within ninety (90) days of the Grantor's death, in the county of the Grantor's residence, specifically referring to this section of this Trust.

ARTICLE VII-NON-ASSIGNABILITY

The interest of any beneficiary hereunder, either as to income or principal, shall not be anticipated, alienated or in any other manner assigned or pledged or promised by such beneficiary and shall not be reached by, or be subject to any legal, equitable, or other process, including any bankruptcy proceeding, or be subject to the interference or control of creditors or others in any way or manner. Notwithstanding any contrary provisions in this Trust Agreement, the Grantor shall retain the power in a non-fiduciary capacity, to exchange trust assets or purchase trust assets for full and adequate consideration.

Agency - The Power of Attorney and Its Role in Real Property Planning

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Garden City, NY

Powers of Attorney
Best Practices
Presented by Ellen G. Makofsky

I. Introduction

a. Power of Attorney statute revised as of September 2010.

i. It remains a topic of intense discussion.

ii. Many attorneys are dissatisfied and critical of the 2010 statutory revisions.

iii. NYSBA has made revisions to the current statute a legislative priority of the Association.

1. Association is vigorously lobbying and promoting passage of new proposed legislation.

2. Until new legislation is enacted we are bound by the current statute.

b. The Statutory Short Form Power of Attorney ("Power of Attorney") is anything but short and is certainly not simple.

i. Reference to "Short Form" means that the listed powers A through N are described in brief on the Power of Attorney form

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and a full description of each power is found in the construction section of the statute. §5-1502 A-N

ii. Often modifications are inserted into document to elaborate on powers described in the construction section.

II. Statutory and Non Statutory Powers of Attorney

a. Requirements §5-1501B1

i. Must be typed or printed in legible letters no less than 12 point in size.

ii. Must be signed and dated by a principal with capacity and such signature must be notarized.

1. Electronic signature is not sufficient.

2. Cannot be signed by a third party at the direction of the principal.

iii. Must be signed and dated by any agent acting on behalf of the principal and such signature(s) must be notarized and dated.

1. No formal space to insert date.

2. Agent should be directed to write in date.

iv. Must contain the exact wording in the "Caution to the Principal" paragraphs. §5-1513 1(a).

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v. Must contain the exact wording in the "Important Information for the Agent" paragraphs §5-1513 1(n).

b. Additional requirements for Statutory Powers of Attorney

i. Must contain the exact wording of the form set forth in §5-1513.

1. Mistake in spelling, punctuation or formatting, or the use of bold or italic type does not disqualify the document as a statutory Power of Attorney BUT the wording of the form as set forth in §5-1513 is required.

ii. Gift transactions §5-1501B2

1. The authority for the agent to make gifts in excess of $500 per year must be granted in the Statutory Gifts Rider ("SGR").

2. The Principal must elect to incorporate the SGR as part of the Power of Attorney form ("POA") and then execute the SGR.

a. A valid SGR requires the following:

i. Typed or printed letters no less than 12 point in size.

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ii. That the SGR is signed and dated by a principal with capacity and such signature must be notarized.

iii. That the SGR be witnessed by 2 persons not named in the instrument as possible recipients of gifts.

iv. The individual who notarizes the principal's signature may also serve as a witness.

v. Be attached to the POA.

vi. Be executed simultaneously with the POA.

b. The agent may not make a gift to him or herself unless specifically authorized to do so in the SGR.

3. Gift transactions may also be authorized in a non-statutory power of attorney.

4. The SGR provides a "Limited Authority To Make Gifts" which if chosen allows the agent to make gifts to a spouse, children and more remote descendants, and parents, in an amount not to exceed the annual federal gift tax exclusion.

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a. Where the principal is married, the gift to children, more remote descendants and parents increases to two times the exclusion amount if the spouse agrees to split gift treatment.

b. The current Federal gift tax exclusion amount is $15,000.

iii. Modifications are permitted in Modifications section of the POA and SGR. §5-1503

1. All changes to the POA must be in the Modifications section of the POA and no modifications regarding transfers of assets are permitted in POA.

2. All modifications regarding transfers of assets or gifts must be made within the SGR.

a. Potential tax, Medicaid and family planning often involves gifts in excess of the annual federal gift tax exclusion.

b. Most clients require that modifications be inserted into the SGR and those modifications depend upon the client's objectives.

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3. Modifications are permitted that are not inconsistent with other provisions of the POA or SGR.

c. Powers concerning real estate transactions.

i. Real estate transactions are construed pursuant to the construction provision found at §5-1502 A.

ii. Title companies may require specific identification of real property in the Statutory Short Form Power of Attorney.

iii. Where future transfers of real property may be a gift, authorization for that transfer must appear in the SGR.

d. Statutory Powers of Attorney are durable unless modified.

i. The power of the agent continues following the incapacity of the principal.

ii. Non-durable powers of attorney may be created.

e. Co-Agents and Successor Agents. §5-1508

i. The principal may designate one or more agents who are required to act jointly unless the principal indicates they may act separately.

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1. Even when agents are expressly permitted to act separately financial institutions often require all agents to sign before a financial transaction can be completed.
2. Some financial institutions refuse to open accounts that require two signatures and this can create a problem for joint agents.

ii. The principal may designate one or more successor agents to act if the initial agent is unable or unwilling to serve.

1. It is difficult to get a third party to accept the successor agent's power to act unless the predecessor initial agent has died.
2. Unwilling to act is a difficult standard to prove.

f. Compensation. §5-1506

i. Without authorization from the principal an agent is not allowed to receive compensation, however the agent is entitled to reimbursement for reasonable expenses.

ii. A provision to allow compensation is included in the POA and is marked OPTIONAL.

1. This requires discussion with the client.

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2. Independent agents may be unwilling to serve without compensation.
3. Allowing family members to receive compensation may create family disharmony.
4. If compensation is permitted the formula for paying out compensation should be included as a modification to the POA.

g. Appointment of a monitor. §5-1509

i. A monitor has the authority to request, receive and seek to compel the agent to provide a record of all receipts, disbursements, and transactions concerning the principal.

ii. An appointed monitor has no fiduciary duty.

III. Termination and Revocation. §5-1511

a. A Power of Attorney terminates when:

i. The principal dies.

ii. The Power of Attorney is not durable and the principal becomes incapacitated.

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iii. Upon the death, resignation or incapacity of both the agent(s) and the successor agent(s).

iv. A court order revokes the Power of Attorney.

b. The principal can revoke a Power of Attorney by notifying the agent of the revocation in a writing which is both signed and dated by the principal.

i. The revocation is not effective as to the agent until the written revocation is received.

ii. Divorce or annulment revokes the appointment of a spouse as an agent.

iii. Execution of a new Power of Attorney does not automatically revoke previously executed Powers of Attorney unless specified in the new Power of Attorney.

iv. Third parties such as financial institutions must be notified of the revocation of Power of Attorney. Without actual notice of termination there is no liability to a third party who acts in good faith under the Power of Attorney.

IV. Third party acceptance of the Power of Attorney. §5-1504

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a. Pursuant to statute no third party doing business in New York shall refuse, without reasonable cause to honor a properly executed Power of Attorney.

    i. Reasonable cause includes but is not limited to the following:

        1. Refusal by the agent to provide an original or attorney certified copy of the Power of Attorney to the third party.
        2. Actual knowledge that a report was made to adult protective services in regard to the principal or a good faith referral of the principal and agent to adult protective services by the third party.
        3. Actual knowledge or reasonable basis for belief that the principal is dead.
        4. Actual knowledge or reasonable belief that the Power of Attorney was executed when the principal was incapacitated or that the principal is incapacitated and the Power of Attorney is non-durable.
        5. Actual knowledge or reasonable belief that the Power of Attorney was procured through fraud, duress or undue influence.

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6. Actual notice of the termination or revocation of the Power of Attorney.
7. The refusal by a title insurance company to underwrite title insurance for a gift of real property made pursuant to a statutory gifts rider or non-statutory Power of Attorney that does not contain express instructions or purposes of the principal.

ii. Unreasonable cause for refusing to honor a properly executed Power of Attorney includes:

1. The Power of Attorney is not on a form prescribed by the third party.
2. There has been a lapse of time since the execution of the Power of Attorney.
3. There is a lapse of time between the date of acknowledgement of the signature of the principal and the date of the signature of the agent.

iii. It is not unreasonable for a third party to require the agent to execute an acknowledged affidavit stating that that Power of Attorney is in full force and effect.

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iv. Third parties are not required to accept a form that is not a statutory Power of Attorney; however, a statutory short form Power of Attorney or non-statutory Power of Attorney shall be accepted for recording if signed by the agent and such signature is acknowledged.

b. Powers of Attorney executed in other jurisdictions. §5-1512

i. A Power of Attorney executed in another state in compliance with the law of that state is valid in New York regardless of whether or not the principal is a New York domiciliary.

ii. A Power of Attorney that meets the New York requirements for statutory and non-statutory Powers of Attorney but is executed outside of New York State by a New York domiciliary is valid in New York.

iii. A Power of Attorney executed in New York by a domiciliary of another state which is in compliance with the law of that state is valid in New York.

c. The exclusive remedy for the unlawful refusal to accept a properly executed statutory Power of Attorney is a special proceeding pursuant to § 5-1510 to compel acceptance of the Power of Attorney.

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i. The statute does not provide for damages.

ii. The statute does not provide for attorney fees.

V. Best Practices.

a. The statute is clear in mandating that where there is no reasonable cause to refute a properly executed statutory Power of Attorney it must be honored by third parties.

b. Clients rely on their attorneys to create Powers of Attorney that will be accepted by third parties.

i. Sometimes when there is a refusal of acceptance of a Power of Attorney the client lacks the capacity to execute another version of a Power of Attorney acceptable to the refusing third party.

ii. Sometimes the agent needs immediate acceptance of the Power of Attorney to effectuate a tax saving or Medicaid plan in a timely manner.

iii. At times the refusal to honor a properly executed Power of Attorney is arbitrary.

iv. Attorney contacts with refusing third parties are problematic, can result in long delays and sometimes defeat.

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c. There is no mechanism in the statute to transfer the costs of a special proceeding to the refusing third party or to provide the wronged party with damages.

d. Survey disseminated to the Trusts & Estates and Real Property Sections received 309 responses and those responses follow this outline.

e. Understanding and discussing Best Practices or the procedures and methods other attorneys employ in an effort to find acceptance of the Powers of Attorney they draft can be helpful.

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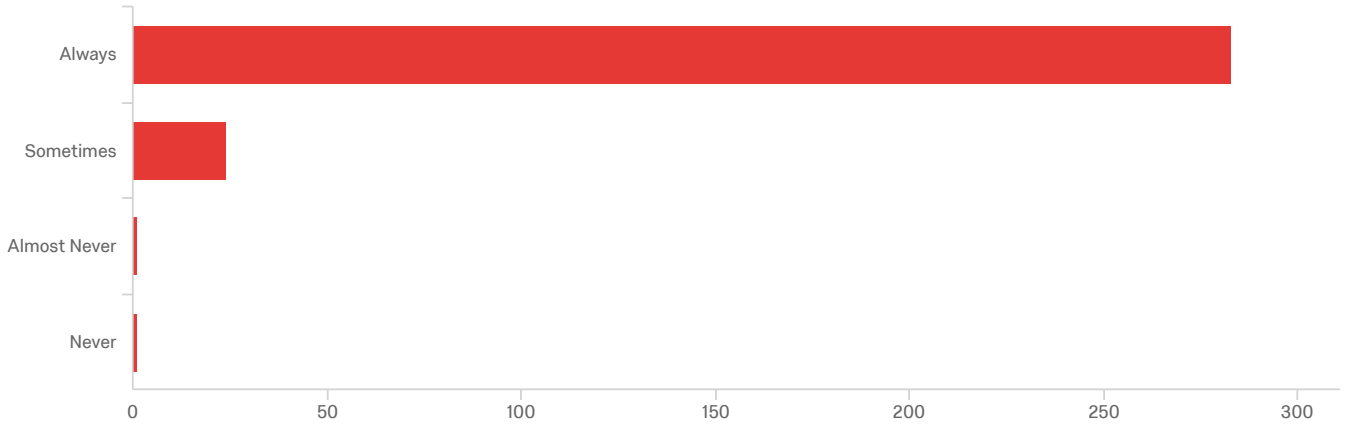
Default Report

2018 Powers of Attorney Best Practices Survey

September 21, 2018 2:46 PM GMT

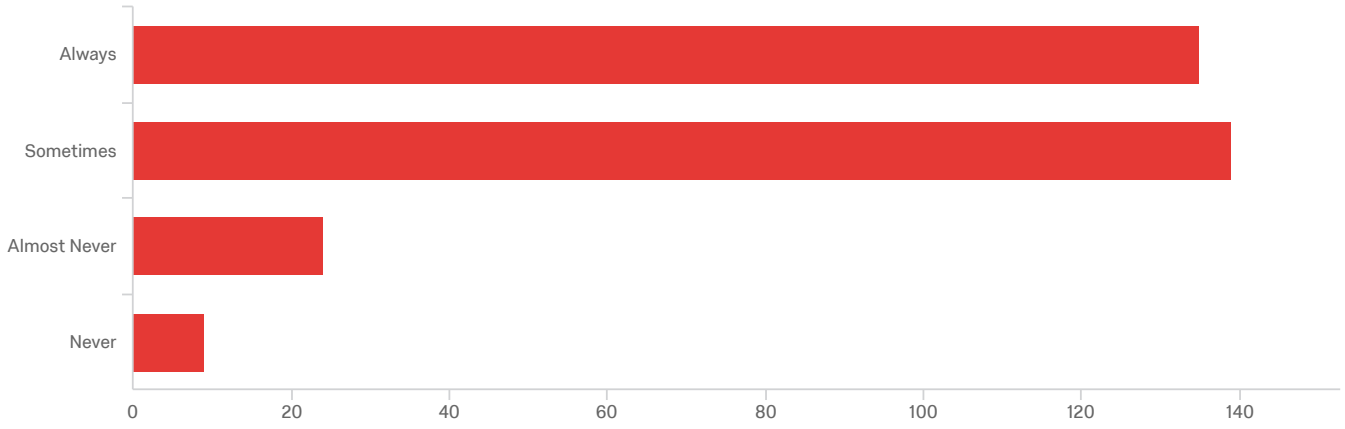
Q2 - 1. I meet with the client (in person or via telephone) prior to the preparation of a Power …



#	Field		Choice Count
1	Always	91.59%	283
2	Sometimes	7.77%	24
3	Almost Never	0.32%	1
4	Never	0.32%	1
			309

Showing Rows: 1 - 5 Of 5

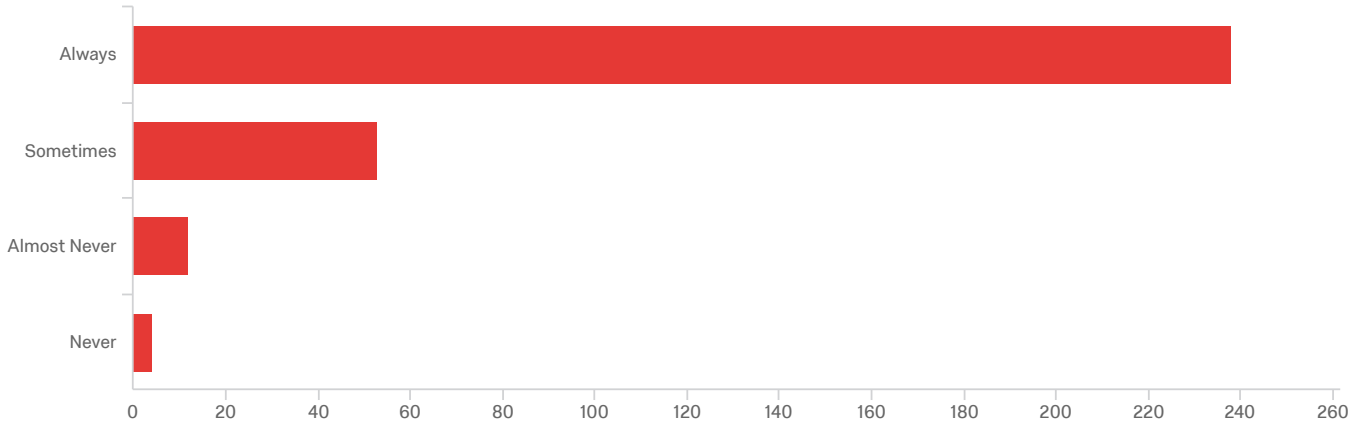
Q3 - 2. I encourage the principal creating the Power of Attorney to name one person as the i…



#	Field	Choice Count	
1	Always	43.97%	135
2	Sometimes	45.28%	139
3	Almost Never	7.82%	24
4	Never	2.93%	9
			307

Showing Rows: 1 - 5 Of 5

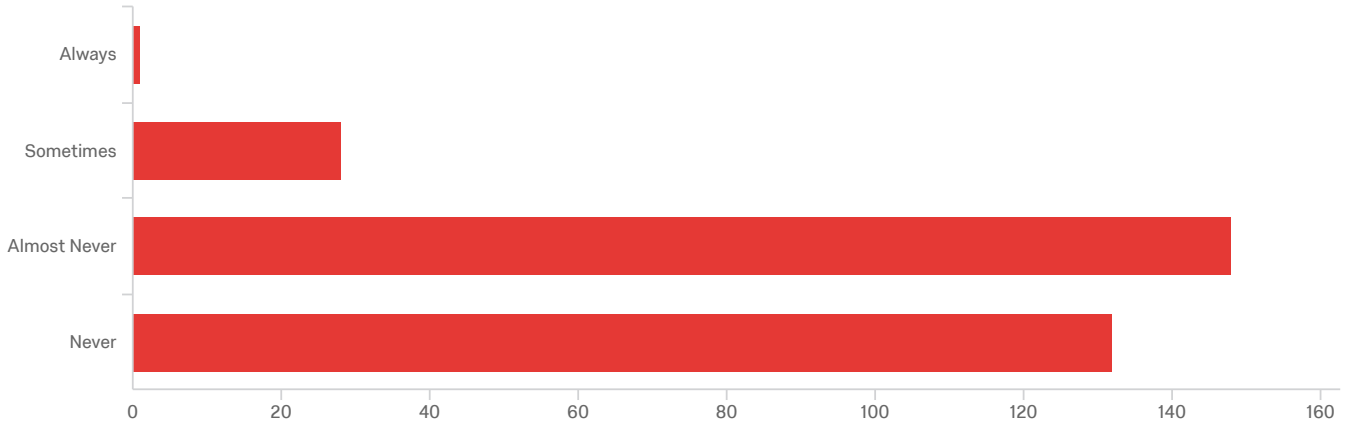
Q4 - 3. I encourage the appointment of a successor agent for the Power of Attorney.



#	Field		Choice Count
1	Always	77.52%	238
2	Sometimes	17.26%	53
3	Almost Never	3.91%	12
4	Never	1.30%	4
			307

Showing Rows: 1 - 5 Of 5

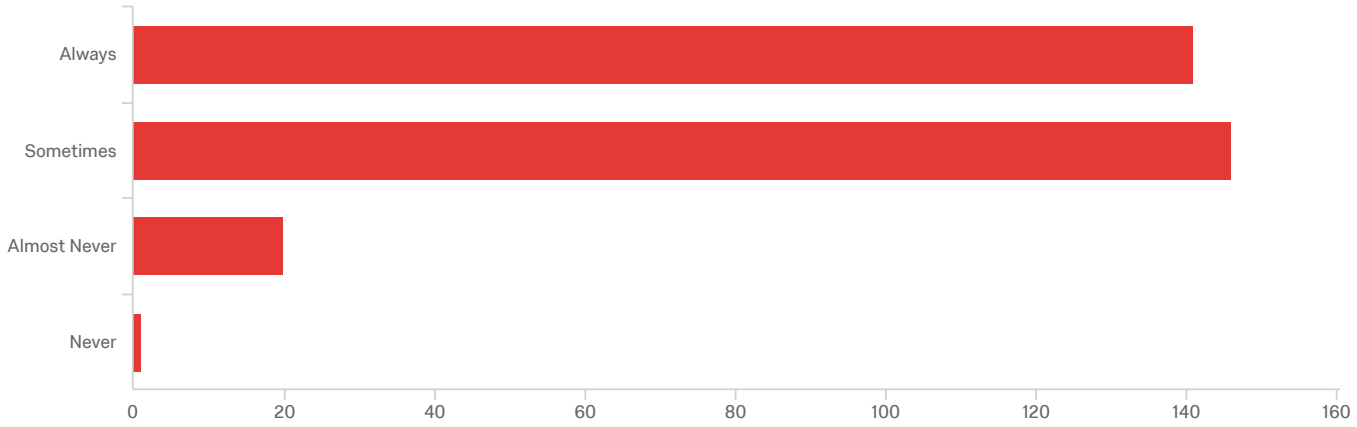
Q5 - 4. I encourage the appointment of a monitor in the Power of Attorney document.



#	Field	Choice Count	
1	Always	0.32%	1
2	Sometimes	9.06%	28
3	Almost Never	47.90%	148
4	Never	42.72%	132
			309

Showing Rows: 1 - 5 Of 5

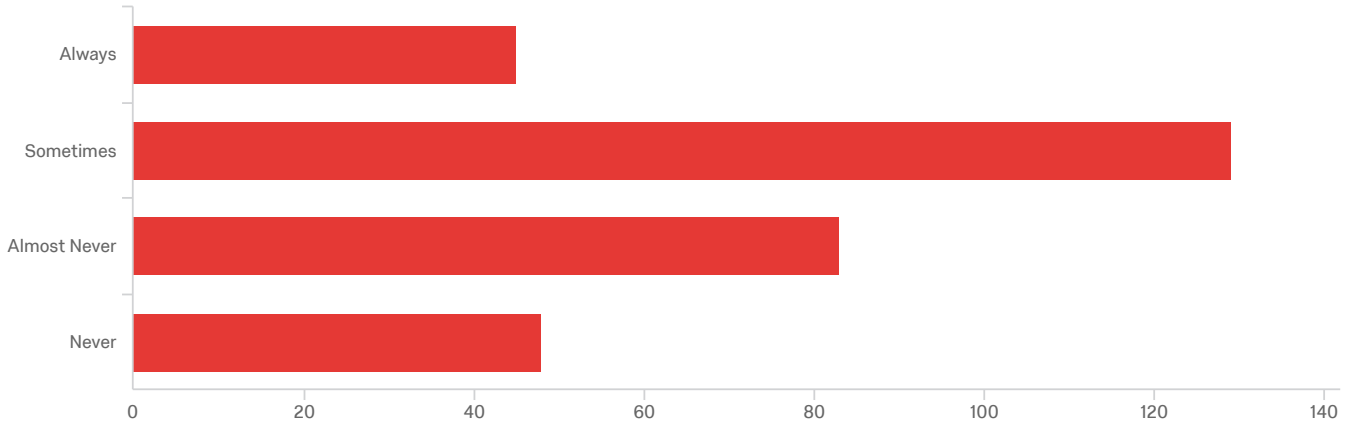
Q6 - 5. I facilitate the signature of the agent immediately following the principal's execution o…



#	Field	Choice Count	
1	Always	45.78%	141
2	Sometimes	47.40%	146
3	Almost Never	6.49%	20
4	Never	0.32%	1
			308

Showing Rows: 1 - 5 Of 5

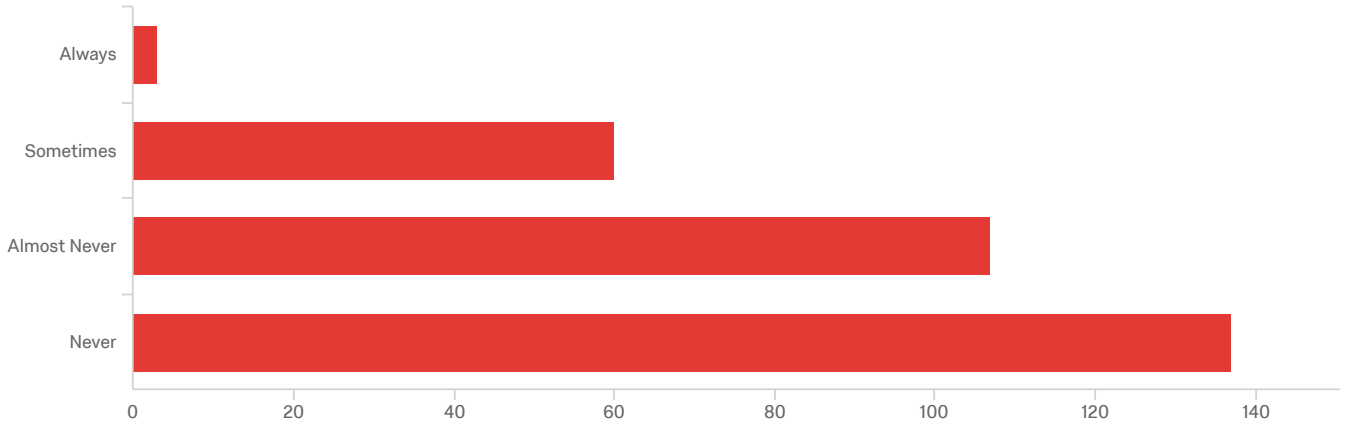
Q7 - 6. I facilitate the signature of the successor agent immediately following the principal's …



#	Field	Choice Count	
1	Always	14.75%	45
2	Sometimes	42.30%	129
3	Almost Never	27.21%	83
4	Never	15.74%	48
			305

Showing Rows: 1 - 5 Of 5

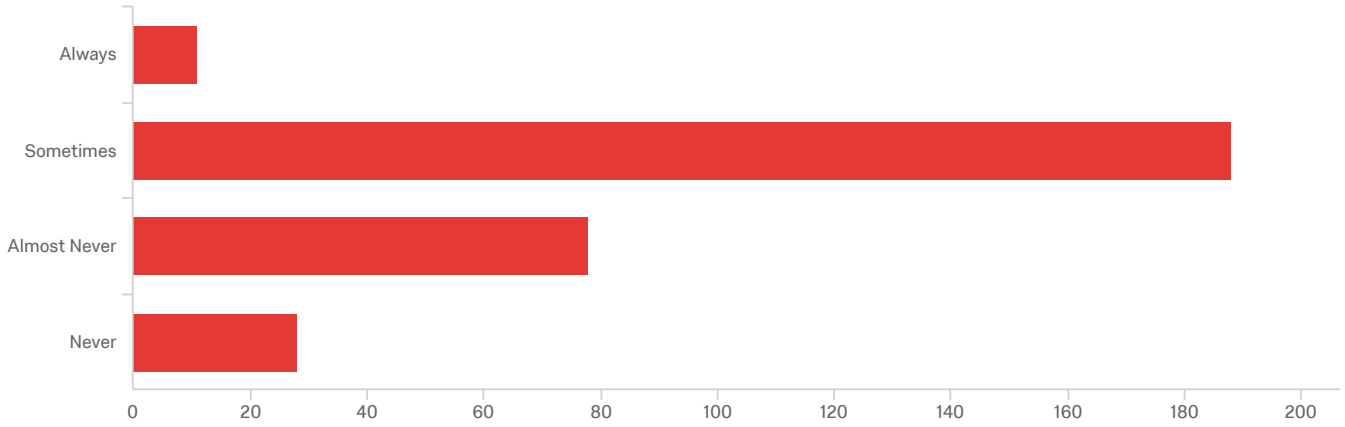
Q8 - 7. I create springing Powers of Attorney for clients.



#	Field	Choice Count	
1	Always	0.98%	3
2	Sometimes	19.54%	60
3	Almost Never	34.85%	107
4	Never	44.63%	137
			307

Showing Rows: 1 - 5 Of 5

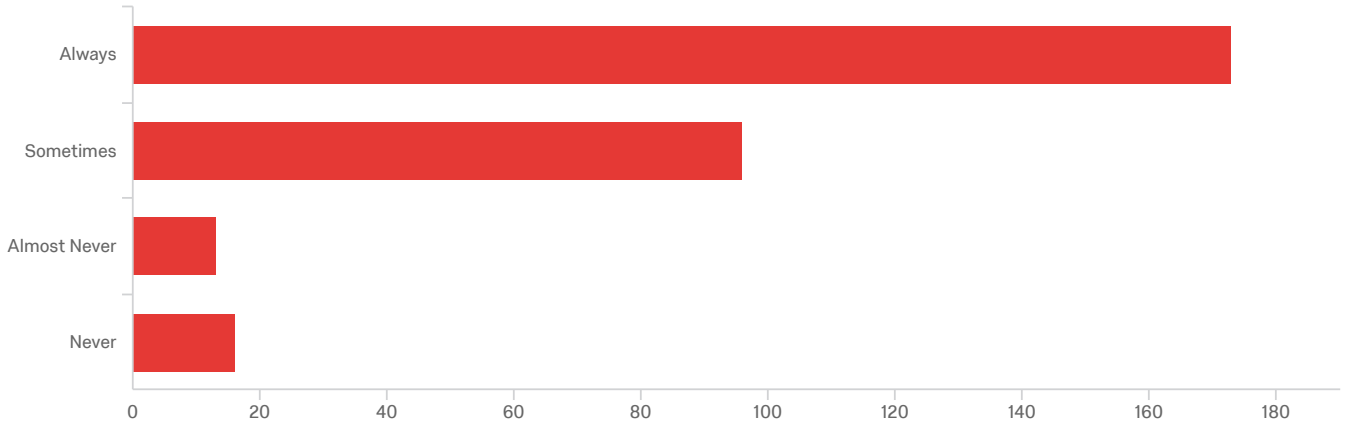
Q9 - 8. I have experienced difficulty with third parties accepting a validly executed Power of …



#	Field	Choice Count	
1	Always	3.61%	11
2	Sometimes	61.64%	188
3	Almost Never	25.57%	78
4	Never	9.18%	28
			305

Showing Rows: 1 - 5 Of 5

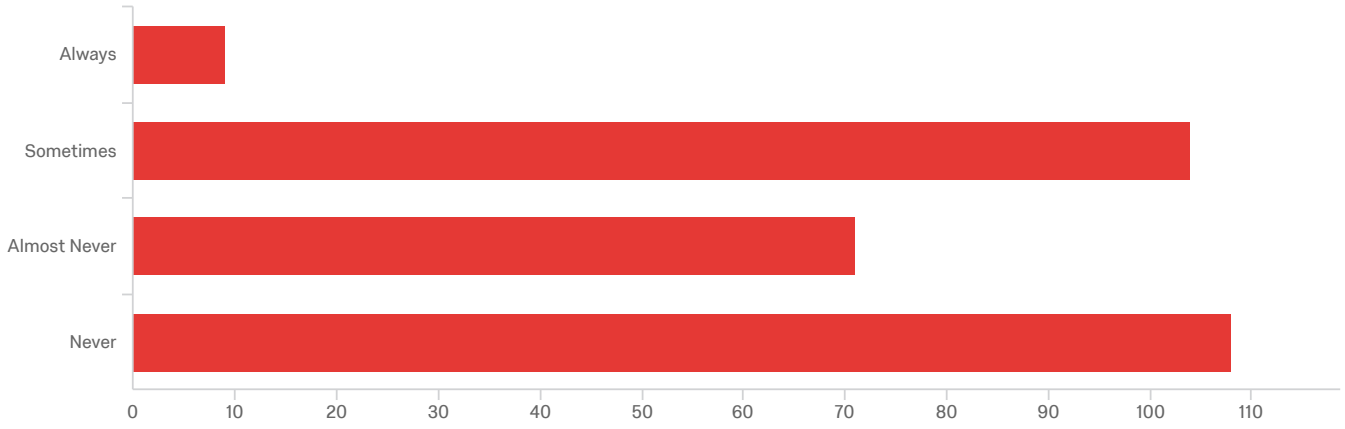
Q10 - 9. I follow up with third parties by telephone or letter when the client has difficulty usin…



#	Field		Choice Count
1	Always	58.05%	173
2	Sometimes	32.21%	96
3	Almost Never	4.36%	13
4	Never	5.37%	16
			298

Showing Rows: 1 - 5 Of 5

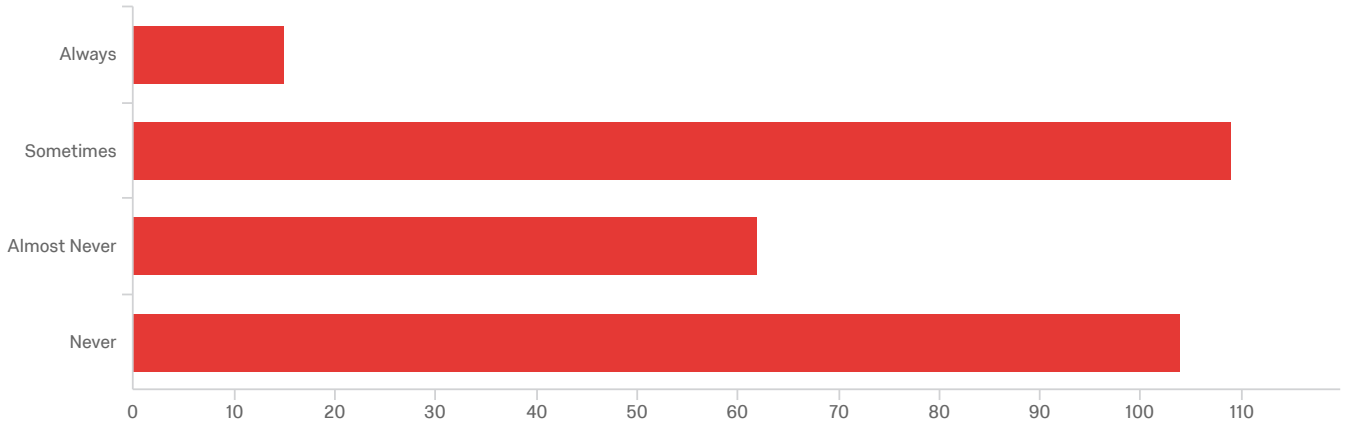
Q11 - 10. I have experienced difficulty with third parties accepting a Power of Attorney where…



#	Field		Choice Count
1	Always	3.08%	9
2	Sometimes	35.62%	104
3	Almost Never	24.32%	71
4	Never	36.99%	108
			292

Showing Rows: 1 - 5 Of 5

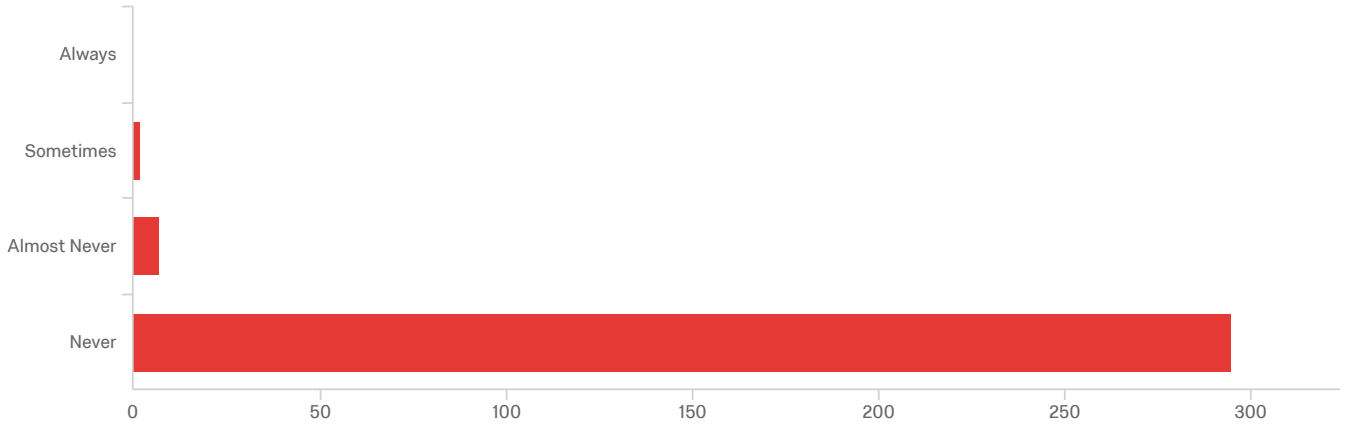
Q12 - 11. I have experienced difficulty with third parties accepting a Power of Attorney where…



#	Field		Choice Count
1	Always	5.17%	15
2	Sometimes	37.59%	109
3	Almost Never	21.38%	62
4	Never	35.86%	104
			290

Showing Rows: 1 - 5 Of 5

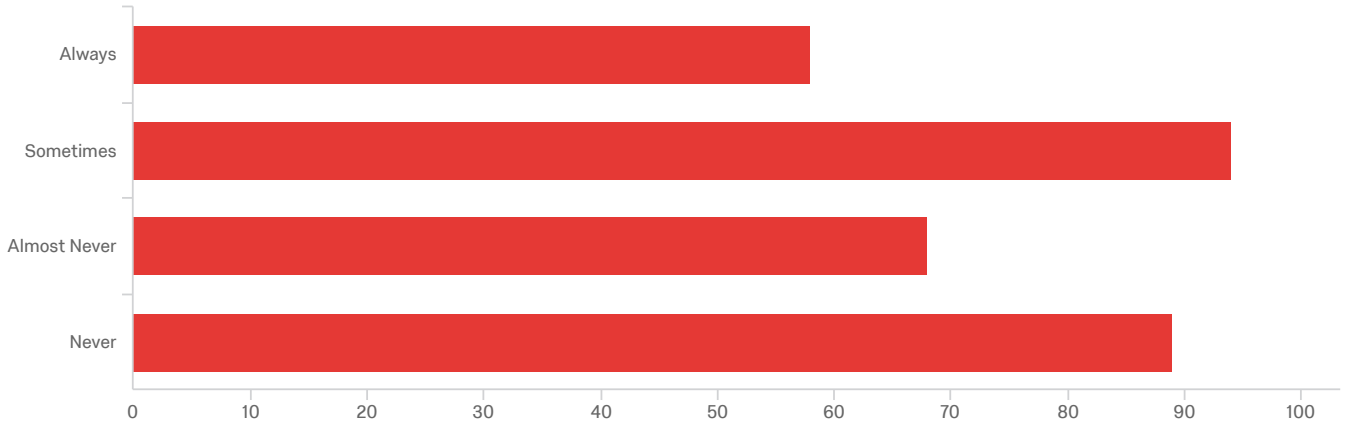
Q13 - 12. I have commenced a special proceeding pursuant to GOL 5-1510 to compel a thir…



#	Field		Choice Count
1	Always	0.00%	0
2	Sometimes	0.66%	2
3	Almost Never	2.30%	7
4	Never	97.04%	295
			304

Showing Rows: 1 - 5 Of 5

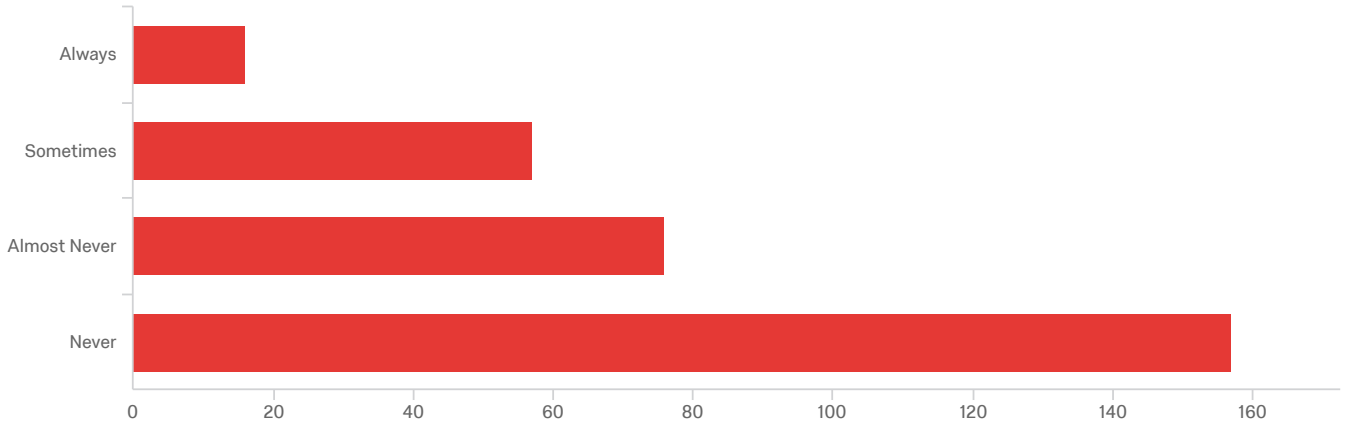
Q14 - 13. I advise clients who have executed a Power of Attorney with modifications prepare…



#	Field		Choice Count
1	Always	18.77%	58
2	Sometimes	30.42%	94
3	Almost Never	22.01%	68
4	Never	28.80%	89
			309

Showing Rows: 1 - 5 Of 5

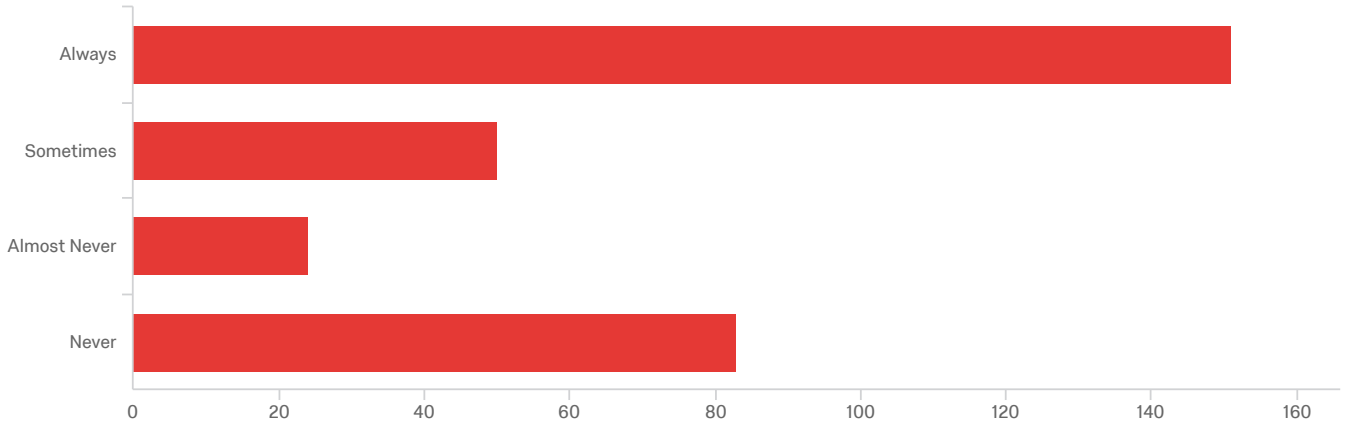
Q15 - 14. I create a separate Power of Attorney with powers focused on real property if the c…



#	Field	Choice Count	
1	Always	5.23%	16
2	Sometimes	18.63%	57
3	Almost Never	24.84%	76
4	Never	51.31%	157
			306

Showing Rows: 1 - 5 Of 5

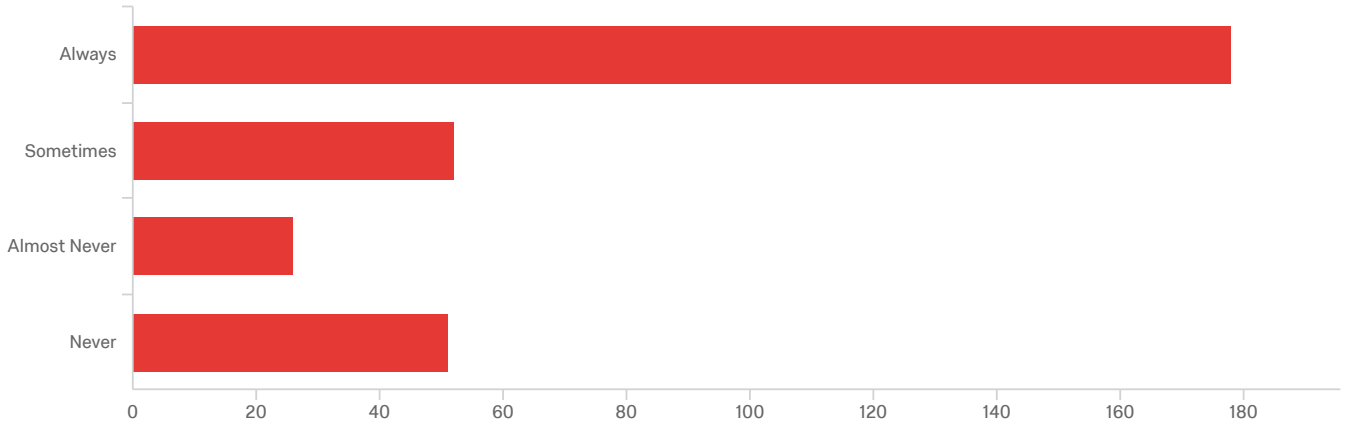
Q16 - 15. I create more than one original Power of Attorney for clients.



#	Field	Choice Count	
1	Always	49.03%	151
2	Sometimes	16.23%	50
3	Almost Never	7.79%	24
4	Never	26.95%	83
			308

Showing Rows: 1 - 5 Of 5

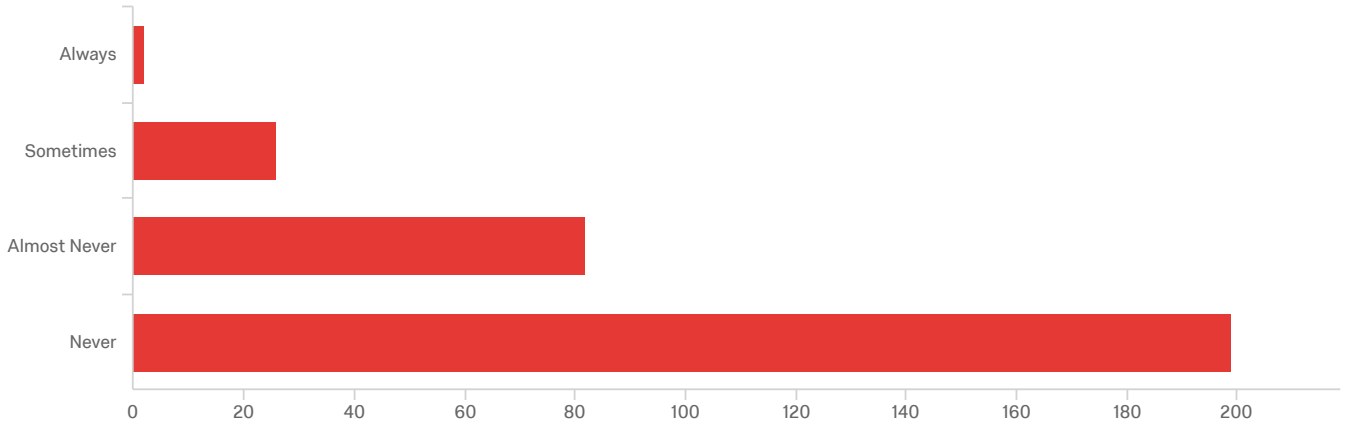
Q17 - 16. I retain one or more original Power of Attorney document executed by the client in …



#	Field	Choice Count	
1	Always	57.98%	178
2	Sometimes	16.94%	52
3	Almost Never	8.47%	26
4	Never	16.61%	51
			307

Showing Rows: 1 - 5 Of 5

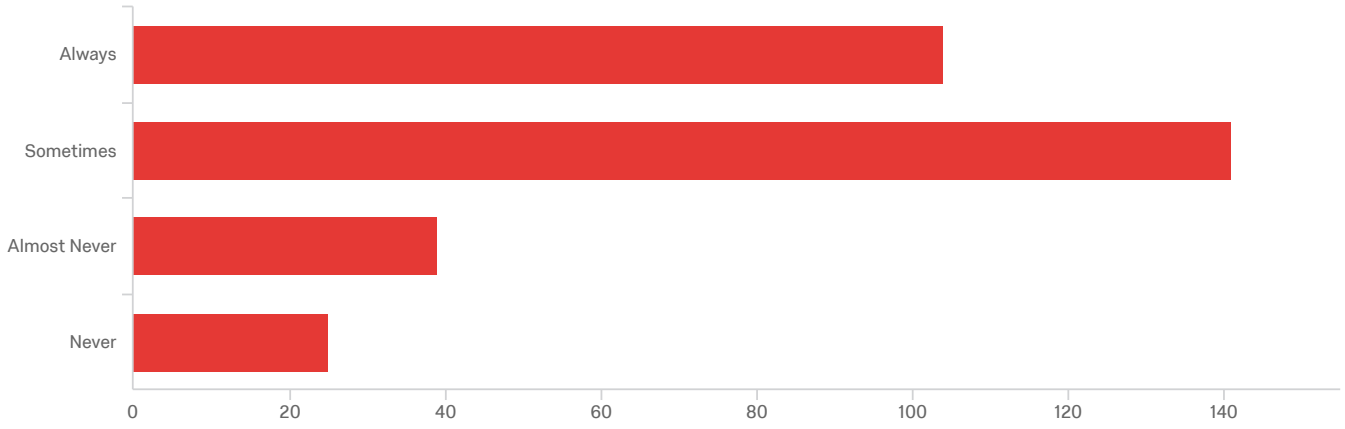
Q18 - 17. I record the original Power of Attorney with the Court after it has been executed.



#	Field		Choice Count
1	Always	0.65%	2
2	Sometimes	8.41%	26
3	Almost Never	26.54%	82
4	Never	64.40%	199
			309

Showing Rows: 1 - 5 Of 5

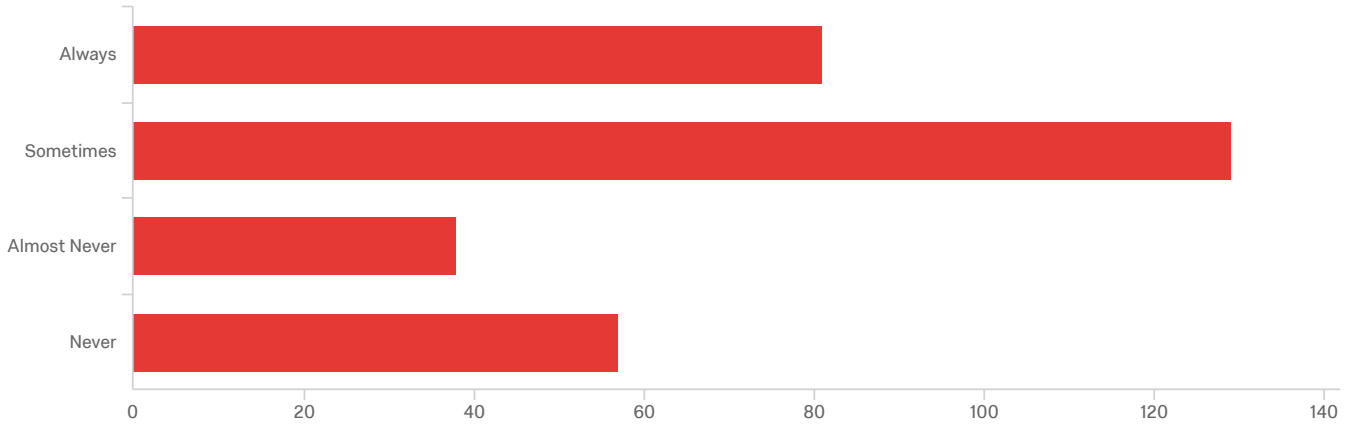
Q19 - 18. I draft gifting powers in the Statutory Gift Rider to comply with the client's testame…



#	Field	Choice Count	
1	Always	33.66%	104
2	Sometimes	45.63%	141
3	Almost Never	12.62%	39
4	Never	8.09%	25
			309

Showing Rows: 1 - 5 Of 5

Q24 - 19. I draft gifting powers in the Statutory Gift Rider to allow for estate gift and tax plan…



#	Field	Choice Count	
1	Always	26.56%	81
2	Sometimes	42.30%	129
3	Almost Never	12.46%	38
4	Never	18.69%	57
			305

Showing Rows: 1 - 5 Of 5

End of Report

New York State Bar Association
New York Statutory Short Form Power of Attorney, 8/18/10, Eff. 9/12/10

POWER OF ATTORNEY
NEW YORK STATUTORY SHORT FORM

(a) CAUTION TO THE PRINCIPAL: Your Power of Attorney is an important document. As the "principal," you give the person whom you choose (your "agent") authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority.

When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. "Important Information for the Agent" at the end of this document describes your agent's responsibilities.

Your agent can act on your behalf only after signing the Power of Attorney before a notary public.

You can request information from your agent at any time. If you are revoking a prior Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to any third parties who may have acted upon it, including the financial institutions where your accounts are located.

You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a "Health Care Proxy" to do this.

The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, www.senate.state.ny.us or www.assembly.state.ny.us.

If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

(b) DESIGNATION OF AGENT(S):

I, _____ _____
(name of principal) *(address of principal)*

hereby appoint:

_____ _____
(name of agent) *(address of agent)*

_____ _____
(name of second agent) *(address of second agent)*

as my agent(s).

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If you designate more than one agent above, they must act together unless you initial the statement below.

(____) My agents may act SEPARATELY.

(c) DESIGNATION OF SUCCESSOR AGENT(S): (OPTIONAL)
If any agent designated above is unable or unwilling to serve, I appoint as my successor agent(s):

_____ _____
(name of successor agent) *(address of successor agent)*

_____ _____
(name of second successor agent), *(address of second successor agent)*

Successor agents designated above must act together unless you initial the statement below.

(____) My successor agents may act SEPARATELY.

You may provide for specific succession rules in this section. Insert specific succession provisions here:

(d) This POWER OF ATTORNEY shall not be affected by my subsequent incapacity unless I have stated otherwise below, under "Modifications".

(e) This POWER OF ATTORNEY DOES NOT REVOKE any Powers of Attorney previously executed by me unless I have stated otherwise below, under "Modifications".

If you do NOT intend to revoke your prior Powers of Attorney, and if you have granted the same authority in this Power of Attorney as you granted to another agent in a prior Power of Attorney, each agent can act separately unless you indicate under "Modifications" that the agents with the same authority are to act together.

(f) GRANT OF AUTHORITY:
To grant your agent some or all of the authority below, either
(1) Initial the bracket at each authority you grant, or
(2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.

I grant authority to my agent(s) with respect to the following subjects as defined in sections 5-1502A through 5-1502N of the New York General Obligations Law:

(____) (A) real estate transactions;

(____) (B) chattel and goods transactions;

(____) (C) bond, share, and commodity transactions;

(____) (D) banking transactions;

(____) (E) business operating transactions;

(____) (F) insurance transactions;

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(____) (G) estate transactions;

(____) (H) claims and litigation;

(____) (I) personal and family maintenance: If you grant your agent this authority, it will allow the agent to make gifts that you customarily have made to individuals, including the agent, and charitable organizations. The total amount of all such gifts in any one calendar year cannot exceed five hundred dollars;

(____) (J) benefits from governmental programs or civil or military service;

(____) (K) health care billing and payment matters; records, reports, and statements;

(____) (L) retirement benefit transactions;

(____) (M) tax matters;

(____) (N) all other matters;

(____) (O) full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select;

(____) (P) EACH of the matters identified by the following letters: _____.

You need not initial the other lines if you initial line (P).

(g) MODIFICATIONS: (OPTIONAL)

In this section, you may make additional provisions, including language to limit or supplement authority granted to your agent. However, you cannot use this Modifications section to grant your agent authority to make gifts or changes to interests in your property. If you wish to grant your agent such authority, you MUST complete the Statutory Gifts Rider.

(h) CERTAIN GIFT TRANSACTIONS: STATUTORY GIFTS RIDER (OPTIONAL)

In order to authorize your agent to make gifts in excess of an annual total of $500 for all gifts described in (I) of the grant of authority section of this document (under personal and family maintenance), you must initial the statement below and execute a Statutory Gifts Rider at the same time as this instrument. Initialing the statement below by itself does not authorize your agent to make gifts. The preparation of the Statutory Gifts Rider should be supervised by a lawyer.

(____) (SGR) I grant my agent authority to make gifts in accordance with the terms and conditions of the Statutory Gifts Rider that supplements this Statutory Power of Attorney.

(i) DESIGNATION OF MONITOR(S): (OPTIONAL)

If you wish to appoint monitor(s), initial and fill in the section below:

(____) I wish to designate _____, whose address(es) is (are) _____, as monitor(s). Upon the request of the monitor(s), my agent(s) must provide the monitor(s) with a copy of the power of attorney and a record of all transactions done or made on my behalf. Third parties holding records of such transactions shall provide the records to the monitor(s) upon request.

(j) COMPENSATION OF AGENT(S): (OPTIONAL)

Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your

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behalf. If you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, initial the statement below. If you wish to define "reasonable compensation", you may do so above, under "Modifications".

(____) My agent(s) shall be entitled to reasonable compensation for services rendered.

(k) ACCEPTANCE BY THIRD PARTIES:

I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Power of Attorney. I understand that any termination of this Power of Attorney, whether the result of my revocation of the Power of Attorney or otherwise, is not effective as to a third party until the third party has actual notice or knowledge of the termination.

(l) TERMINATION:

This Power of Attorney continues until I revoke it or it is terminated by my death or other event described in section 5-1511 of the General Obligations Law.

Section 5-1511 of the General Obligations Law describes the manner in which you may revoke your Power of Attorney, and the events which terminate the Power of Attorney.

(m) SIGNATURE AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on the ____ day of _____, 20__

PRINCIPAL signs here: ====> _____

STATE OF NEW YORK)
) ss:
COUNTY OF _____)

On the ____ day of _____, 20__, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

(n) IMPORTANT INFORMATION FOR THE AGENT:

When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

(1) act according to any instructions from the principal, or, where there are no instructions, in the principal's best interest;

(2) avoid conflicts that would impair your ability to act in the principal's best interest;

(3) keep the principal's property separate and distinct from any assets you own or control, unless otherwise permitted by law;

(4) keep a record or all receipts, payments, and transactions conducted for the principal; and

(5) disclose your identity as an agent whenever you act for the principal by writing or printing the principal's name and signing your own name as "agent" in either of the following manners: (Principal's Name) by (Your Signature) as Agent, or (your signature) as Agent for (Principal's Name).

You may not use the principal's assets to benefit yourself or anyone else or make gifts to yourself or anyone else unless the principal has specifically granted you that authority in this document, which is either a Statutory Gifts Rider attached to a Statutory Short Form Power of Attorney or a Non-Statutory Power of Attorney. If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal's best interest.

You may resign by giving written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal's guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.

Liability of agent: The meaning of the authority given to you is defined in New York's General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.

(o) AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.

I/we, _____, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as agent(s) for the principal named therein.

I/we acknowledge my/our legal responsibilities.

Agent(s) sign(s) here: ==> _____

==> _____

STATE OF NEW YORK)
) ss:
COUNTY OF _____)

On the _____ day of _____, 20__, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

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(p) SUCCESSOR AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the SUCCESSOR agent(s), if any, sign at the same time, nor that multiple SUCCESSOR agents sign at the same time. Furthermore, successor agents can not use this power of attorney unless the agent(s) designated above is/are unable or unwilling to serve.

I/we, _____, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as SUCCESSOR agent(s) for the principal named therein.

Successor Agent(s) sign(s) here: ==> _____

==> _____

STATE OF NEW YORK)
) ss:
COUNTY OF _____)

On the _____ day of _____, 20___, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

New York State Bar Association
Statutory Gifts Rider, 8/18/10, Eff. 9/12/10

POWER OF ATTORNEY
NEW YORK STATUTORY GIFTS RIDER
AUTHORIZATION FOR CERTAIN GIFT TRANSACTIONS

CAUTION TO THE PRINCIPAL: This OPTIONAL rider allows you to authorize your agent to make gifts in excess of an annual total of $500 for all gifts described in (I) of the Grant of Authority section of the statutory short form Power of Attorney (under personal and family maintenance), or certain other gift transactions during your lifetime. You do not have to execute this rider if you only want your agent to make gifts described in (I) of the Grant of Authority section of the statutory short form Power of Attorney and you initialed "(I)" on that section of that form. Granting any of the following authority to your agent gives your agent the authority to take actions which could significantly reduce your property or change how your property is distributed at your death. "Certain gift transactions" are described in section 5-1514 of the General Obligations Law. This Gifts Rider does not require your agent to exercise granted authority, but when he or she exercises this authority, he or she must act according to any instructions you provide, or otherwise in your best interest.

This Gifts Rider and the Power of Attorney it supplements must be read together as a single instrument.

Before signing this document authorizing your agent to make gifts, you should seek legal advice to ensure that your intentions are clearly and properly expressed.

(a) GRANT OF LIMITED AUTHORITY TO MAKE GIFTS

Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property.

If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.

(_____) I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code. This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) MODIFICATIONS:

Use this section if you wish to authorize gifts in amounts smaller than the gift tax exclusion amount, in amounts in excess of the gift tax exclusion amount, gifts to other beneficiaries, or other gift transactions. Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. If you wish to authorize your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

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(_____) I grant the following authority to my agent to make gifts pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest:

(c) GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE GIFTS TO HIMSELF OR HERSELF: (OPTIONAL)

If you wish to authorize your agent to make gifts to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted, and any limitations and guidelines.

(_____) I grant specific authority for the following agent(s) to make the following gifts to himself or herself:

This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(d) ACCEPTANCE BY THIRD PARTIES:

I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Statutory Gifts Rider.

(e) SIGNATURE OF PRINCIPAL AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on _____, 20__.

PRINCIPAL signs here: ====> _____

STATE OF NEW YORK)
) ss:
COUNTY OF _____)

On the ____ day of _____, 20__, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in her/his capacity, and that by her/his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

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(f) SIGNATURES OF WITNESSES:

By signing as a witness, I acknowledge that the principal signed the Statutory Gifts Rider in my presence and the presence of the other witness, or that the principal acknowledged to me that the principal's signature was affixed by him or her or at his or her direction. I also acknowledge that the principal has stated that this Statutory Gifts Rider reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as a permissible recipient of gifts.

Signature of witness 1	Signature of witness 2
Date	Date
Print Name	Print Name
Address	Address
City, State, Zip code	City, State, Zip code

(g) This document prepared by:

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Real Estate in Estates:
An Ethical Trap for the Unwary?

Hon. Stacy L. Pettit
Albany County Surrogate's Court
Albany, NY

REAL PROPERTY AND ESTATE ADMINISTRATION: A TRAP FOR THE UNWARY?
(Ethical Considerations when Dealing with Real Estate in Estates)

Hon. Stacy L. Pettit, Surrogate
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ESTATE ADMINISTRATION AND REAL PROPERTY

- **The transfer and administration of real property in an estate can raise serious ethical issues, and often creates significant tension among estate beneficiaries, intestate distributees and fiduciaries.**
- **This material and discussion is intended to highlight some of the most common issues seen in Surrogate's Court related to real property, and the potential ethical issues that come with real estate in estates.**

ADVISING WHETHER TO ACCEPT APPOINTMENT AS FIDUCIARY

- **As you are aware, real estate in an estate can create many conflicts. Should a person, named or not, become the fiduciary?**
- **Acceptance of the fiduciary responsibility is voluntary. Having once accepted, the fiduciary cannot resign without permission of the court and accounting for the actions taken.**
- **The nominated fiduciary should carefully weigh the risks, responsibilities and duties involved in deciding whether to accept or decline the appointment (see EPTL Art. 11 authority of fiduciary).**
- **Relevant questions for making the decision:**

- **Does the fiduciary have a conflict that will make it difficult to administer the estate?**
- **Is there potential litigation against the attorney-drafter (see Schneider v. Finmann, 15 NY3d 306 [2010]), existing litigation in which the decedent was a plaintiff or defendant, an ongoing business that needs to be continued or sold, or administration of unusual assets (vacation property?) or assets subject to significant fluctuations in value?**
- **Does the fiduciary have authority under the will to deal with property (including complex assets subject to administration) and what protections, if any, are offered before and after the will is probated?**
- **Is the estate insolvent (or real estate heavy without liquid assets), and if so, will fiduciary still receive commissions?**

SPECIFICALLY DEVISED REAL PROPERTY

- **Title to specifically devised real property vests in the specific devisee immediately upon decedent's death (see Waxson Realty Corp. v Rothschild, 255 NY 332 [1931]; Matter of Payson, 132 Misc 2d 949 [Sur Ct, Nassau County 1986]).**
- **Immediate vesting means that an executor does not have the authority to manage the property or pay for the maintenance and upkeep of such property out of estate funds.**
- **The specific devisee, rather, is liable for the expenses of maintaining and operating the property from the date of death forward (see Matter of Williams, 71 Misc 2d 243 [Sur Ct, NY County 1972]).**

- **Specifically devised real property has priority over other assets with respect to abatement, is not subject to fiduciary commissions and does not carry out income earned by the estate (see EPTL 13-1.3; 26 USCA §§ 662, 663).**
- **In some cases, it may be necessary to sell specifically devised real property for the payment of debts and administration expenses of the estate (see SCPA 1902). Article 19 of the SCPA permits a fiduciary to obtain court approval to divest the beneficiaries of the property and sell real property in certain situations discussed herein.**

INTESTATE DISTRIBUTION

- **When a decedent dies without a will, real property vests in decedent's distributees at the time of death and, in general, is not subject to estate administration. Therefore, an administrator has no automatic right to list and sell real estate without consent of the distributees. Without consent, there is a title issue.**
- **Article 19 would also apply to property passing in intestacy; thus the administrator may apply to reclaim real property from vested distributees to sell if necessary to pay the debts and administration expenses of the estate.**

REAL ESTATE NOT SPECIFICALLY DEVISED IN A WILL

- **Under a will, real property which is not specifically devised vests in the residuary beneficiaries as of date of death, like specifically devised property, subject to a need to sell to satisfy debts and obligations of estate (see Matter of Katz, 55 AD3d 836 [2008]).**

- **Unless specifically devised, EPTL 11-1.1 (b) (5) permits a fiduciary to manage and sell property that is not specifically devised without court order (unless self-dealing).**
- **The authority to sell real property does not have to be expressly stated in the will, but rather may be implied as a necessary component to effectuate decedent's testamentary scheme (see Salisbury v Slade, 160 NY 278 [1899]).**
- **In general, courts will not interfere with an executor's decision to sell real property, but if the value of the property in an estate is uncertain or in dispute, the fiduciary may petition the Court for advice and direction as to the propriety, price, manner and time of sale (see SCPA 2107). A Surrogate has discretion to accept or deny making a determination on an advice and direction petition.**
- **A fiduciary may be limited, however, in the ability to sell the real property if the beneficiaries demand the real property in kind (see Matter of Sherburne, 95 AD2d 859 [2d Dept 1983]).**
- **Commissions are not payable on real property which vested and was not sold by the fiduciary.**

WHEN BENEFICIARIES DISAGREE, WHO IS YOUR CLIENT?

- **An attorney retained by an estate fiduciary for the performance of estate duties is the attorney for the fiduciary, not for the estate (In re Schrauth's Will, 249 A.D. 847, [2d Dep't 1937])**
- **"No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary" (CPLR 4503 [a] [2] [1]).**

- **What about when the fiduciary also has a personal interest as a beneficiary? What if the fiduciary wants to bring an Article 19 proceeding to sell the house to himself?**
- **Remember attorney fees paid by the estate for work performed by the fiduciary's attorney should be to benefit the estate, not the fiduciary in his personal status as beneficiary.**

ATTORNEY MAY NOT REPRESENT PARTY IN OPPOSITION TO FORMER CLIENT

Let's say the attorney is the "family attorney" who handled the client's real estate closings, drafted the will, dealt with one child's landlord issue and the other child's speeding ticket years ago. Now there's an estate, and one child is living in the house and won't leave. Both are named executors, and now, they don't agree on anything.

- **Counsel may not begin to represent a party where there was a prior attorney-client relationship with another party and the representations are both adverse and substantially related, unless the former client gives informed consent in writing (Solow v W.R. Grace & Co., 83 NY2d 303 [1994]).**
- **What constitutes a conflict tends to be fact-specific and is the subject of continued refinement by the courts. However, it is well settled that an attorney who has represented two fiduciaries cannot later represent one in a proceeding against the other involving the same estate (Matter of Hof, 102 AD2d 591 [2d Dept 1984]).**

STICKY ISSUES: MORTGAGES AND LIENS ON REAL PROPERTY

- **Without an express indication in the will to exonerate specifically devised real property from an encumbrance such as a mortgage or lien, a fiduciary is not responsible for the satisfaction of the encumbrance out of estate assets (see EPTL 3-3.6).**
- **The encumbrance is chargeable against the property and the beneficiary receives the property subject to the encumbrance.**
- **Where property encumbered by a lien or mortgage is transferred to two or more persons, the respective interests in the property share a proportionate share of such debt.**
- **Notably, a general provision in a will for the payment of debts is not an indication that such encumbrances be paid by the estate on specifically devised property.**

STICKY ISSUES: PROPERTY TAXES

- **A fiduciary may pay taxes which were assessed on real property prior to decedent's death, however, the specific devisees or vested distributees must reimburse the estate for the taxes (see SCPA 1811 [2] [b]).**
- **An executor does not need prior court approval to pay these taxes (see Matter of Steele, 33 Misc 2d 694 [Sur Ct, NY County 1962]).**
- **If decedent's will expressly indicates that such taxes or any liens on the real estate be paid out of estate funds, reimbursement will not be necessary.**
- **Property taxes levied after death are the responsibility of the devisees/beneficiaries of the real property.**

ANCILLARY PROBATE

- **The probate of a will or appointment of an administrator in New York does not give a fiduciary the authority to dispose of real property in another state.**
- **In that case, an ancillary probate or administration will be necessary in the other state.**
- **The manner in which such property descends when not disposed of by will is determined by the law of the jurisdiction in which the property is situated (see EPTL 3-5.1 [b] [1]). Intestacy statutes differ state by state.**

MORE MESSY ISSUES: DIVORCE

- **A divorce or a judicial decree of separation will terminate a joint tenancy (tenancy by entirety) between spouses and the spouses become tenants in common (see Kahn v Kahn, 43 NY2d 203 [1977]; EPTL 5-1.4).**
- **If the property is not transferred as part of the divorce proceeding or before the death of the first spouse, one-half of the property will pass by such spouse's will or in intestacy.**
- **In that case, the surviving ex-spouse may own the property with a potentially hostile co-owner.**

THE EFFECT OF THE ANTI-LAPSE STATUTE

- **If a specific devisee (or residuary beneficiary) predeceases the decedent and there is no survivorship language in the will, EPTL 3-3.3 provides that the property will not**

lapse, but rather will pass to the specific devisee's issue if such devisee was a brother, sister or issue of decedent.

- **In that case, it is possible that an infant may become an owner of the real property, which will create additional legal hurdles in the management or sale of the property.**
- **EXAMPLE: The home is devised in a will to two children equally. There is no direction if a child predeceases. One child predeceased with minor children. Result: Half is owned by living child, and half by minor grandchildren.**

BE WARY WHEN RENOUNCING REAL PROPERTY

- **If a renunciation (EPTL 2-1.11) of an estate interest in real property is made, the terms of the will and any applicable statutes control who will receive the property, as if the renouncing party predeceased the decedent. The renouncing party may not choose who receives the property, and the anti-lapse statute may be brought into play by a renunciation.**
- **EXAMPLE: Decedent's will leaves her Adirondack camp property to her son and her daughter, equally. Daughter files a renunciation of her interest in the property in Surrogate's Court, believing her brother would then own the entire camp.**
- **Unintended consequences: Daughter has 2 minor children, and the anti-lapse statute (EPTL 3-3.3) applies to cause her renounced interest to pass to her minor children as if she predeceased decedent, which, of course, was not intended. Brother now owns the camp with 2 minor children.**
- **Note: All renunciations are irrevocable and cannot be undone once filed (EPTL 2-1.11 [h]).**

SCPA ARTICLE 19 – DISPOSITION OF REAL PROPERTY

- **Real property may be sold by a fiduciary, if approved by Surrogate's Court, when necessary to pay administration and funeral expenses, debts existing at decedent's death, estate taxes, distributions to beneficiaries, and for any other purpose the court deems necessary (see SCPA 1902).**
- **This is true even when the real property is specifically devised or passes to decedent's intestate distributees. The application to sell real property may be made in an independent SCPA Article 19 proceeding or in a judicial settlement of the fiduciary's account.**
- **Surrogate's Court also has jurisdiction to evict a party or tenant (see Matter of Piccione, 57 NY2d at 288 [1982]).**
- **A "fiduciary or any person interested" may commence an Article 19 proceeding to sell real property (SCPA 1904). Notably, a creditor is not defined as "a person interested" who could commence this proceeding (see SCPA 103 [39]). Creditors may, however, compel an accounting and request the relief in the petition to compel an accounting.**
- **If an Art. 19 proceeding is commenced, the petitioner must serve a citation on all interested persons, including persons entitled to share under the will or by intestacy and guardians of such persons under a disability. The court may also order service on creditors of the estate, but is not required to do so (SCPA 1904 [2]).**
- **If the request to sell real property is brought in an accounting proceeding under SCPA 2210, process shall issue to all interested persons, including creditors, and notice that such relief is being sought must be included in the citation.**

DISPUTES BETWEEN ESTATE BENEFICIARIES OR BETWEEN LIVING PERSONS?

- **In some cases, one or more beneficiaries may take up residence in the property, specifically bequeathed or otherwise, to the exclusion of the other beneficiaries.**
- **In other cases, a disagreement among the beneficiaries may arise as to the eventual sale of the property.**
- **It is not always clear whether Surrogate's Court has subject matter jurisdiction of a particular dispute because the dispute is often determined to be one between living persons. Sometimes the cases seem to be in conflict, but a close look reveals some common threads. Are all of the parties interested in the estate or are there other additional parties involved? Is the real estate local to the Surrogate Court deciding the matter? How long ago did the real estate vest in the beneficiaries of the estate?**

DISPUTES BETWEEN LIVING PERSONS

- **Given that title to real property vests in the ultimate beneficiaries, subject to the fiduciary's right to petition to sell the property to pay debts and expenses, such disputes (at some point during administration) may be determined to be disputes between living parties and no longer under the jurisdiction of Surrogate's Court (see Matter of Van Dorn, 225 AD2d 969 [3rd Dept 1996]; Matter of O'Hara, 50 Misc 3d 1221 [A] [Sur Ct, Queens County 2016]); SCPA 201.).**
- **In such a case, a partition action or other similar action in Supreme Court may be necessary.**

MATTER OF VAN DORN, (225 AD2d 969 [3rd Dept 1996])

- **In this case, decedent died intestate in 1983 and was the owner of real property. Decedent's only distributees were her two sons, petitioner and respondent. Respondent resided at the property seven years after decedent's death, until Albany County acquired title pursuant to a judgment in an *in rem* tax foreclosure proceeding. Thereafter, petitioner and respondent paid the back taxes, and acquired title from the county as tenants in common.**
- **Petitioner, acting as administrator, filed a petition in Surrogate's Court seeking the removal of respondent from the premises. Respondent applied for an order dismissing the pending eviction proceeding on the ground that Surrogate's Court lacked subject matter jurisdiction. Petitioner then commenced a turn over proceeding seeking an order directing that the real property be re-conveyed by the parties back into the estate and that the estate be allowed to remove respondent from the property. Respondent sought an order dismissing the petition on the ground that Surrogate's Court lacked subject matter jurisdiction.**
- **The Appellate Division affirmed the order of Surrogate's Court which granted both the motion to dismiss the eviction proceeding and the motion to dismiss the turnover petition.**
- **The court observed that although it is fundamental that Surrogate's Court has exclusive jurisdiction over all the affairs of a decedent, the real property ceased to be an estate asset as a result of the tax foreclosure. The redemption of the real property by the sole distributees, as tenants in common after title had passed to the county, did not reestablish jurisdiction in the Surrogates Court.**

- **This had become a matter between living parties, no longer under Surrogate's Court jurisdiction.**

<u>GENERATION MORTGAGE CO. v JAKUBOSKY,</u> NYLJ 1202787596088, at *1 (Sur Ct Queens, 2017)

- **The real property was originally owned by two tenants in common, Frances and Lawrence Jakubosky, each with a 50% ownership. Frances died in 2007, survived by three issue (one of them being Lawrence). Lawrence, on his own, executed a reverse mortgage encumbering the entire premises, and died in 2014. Plaintiff Mortgage Co. moved for a default judgment in an action to foreclose on the mortgage. The action was transferred from Supreme Court to Surrogate's Court (apparently on the basis that both original owners were deceased).**
- **The court stated Lawrence was incapable of encumbering the entire premises with the mortgage - Frances died intestate and her interest passed by operation of law to her distributees. As such, Lawrence owned 66.67%, and the other two distributes owned 16.67 percent each at the time of Frances' death. Thus, to the extent plaintiff sought to foreclose against the interests the other two distributees obtained from Frances in intestacy, it would fail to state a claim, and as the dispute was between living parties, the matter was not within the court's jurisdiction. Hence, the mortgage company's motion was denied.**

MATTER OF HENNEL, 29 NY3d 487 (2017)

- **Decedent owned a four-unit rental. In 2006, decedent asked his grandsons to assume management responsibilities for the rentals. Decedent executed a deed to the property reserving a life estate and granted the remainder interest to grandsons. Decedent assured grandsons (while meeting with his attorney) that they would not be burdened by the mortgage on the property when they became full owners, and decedent contemporaneously executed a will directing that the mortgage on the property be paid from the assets of his estate upon his death. The grandsons maintained the property, including collecting the rents and paying the mortgage out of the rents collected, paying the net to the grandfather.**
- **Decedent executed a new will in 2008 that revoked the prior will and made no provision for discharging the mortgage. Decedent died in 2010. Decedent's widow/executor admitted the 2008 will to probate. The grandsons filed a notice of claim, asserting that they had entered into a valid agreement with decedent and in exchange for maintaining the property during decedent's lifetime they would receive the property free and clear of the mortgage upon his death.**
- **The Court of Appeals reversed the App. Div. and Surrogate's Court (who found for the grandsons). In doing so, the Court held petitioners were bound by the statute of frauds (agreement must be in writing), but the Court adopted promissory estoppel as an exception to the statute of frauds. The Court held that "where the elements of promissory estoppel are established, and the injury to the party who acted in reliance on the oral promise is so great that enforcement of the statute of frauds**

would be unconscionable, the promisor should be estopped from reliance on the statute of frauds."

- **In this case, however, the Court held that petitioners' proof did not demonstrate "an unconscionable injury sufficient to estop respondent's reliance on the statute of frauds." The Court explained that petitioners were able to make the mortgage payments from the rental income, there was no claim that the management responsibilities were so overwhelming that they were forced to sacrifice other opportunities, and that they could still sell the property and net $150,000 (Matter of Hennel, 29 NY3d 487 [2017]).**

MATTER OF CAGINO, NYLJ, Dec. 19, 2017 at 41 (Sur Ct, Albany County 2017)

- **Decedent died survived by four adult children who had previously inherited their mother's half-interest in a valuable rental property in Brooklyn.**
- **Decedent's will left his half of the real estate to only three of his four children. Decedent's disinherited daughter commenced a partition action in Kings County Supreme Court against petitioner, individually and as preliminary executor of the estate, and against decedent's two other children. She also filed objections to probate of decedent's will in Albany Surrogate's Court.**
- **Petitioner moved to transfer the Kings County partition action to Albany Surrogate's Court, because the same parties were involved in both proceedings. Supreme Court would not grant without Surrogate's Court's order accepting the transfer. Petitioner then moved in Surrogate's Court to accept the transfer from Supreme Ct. Respondent opposed the motion.**

- **Surrogate's Court denied the motion and would not accept transfer of the partition action pending in Kings County Supreme.**
- **Determining Surrogate's Court lacked jurisdiction of the partition action even though it did have jurisdiction of decedent's estate, the following factors were important: 1) only half of the property is in the estate, while the other half is owned outright by the four children as living parties; 2) although all the parties are the same, the partition action concerns accounting for property management for many years prior to death of decedent; 3) a partition sale should take place in the County where the property lies; and 4) probate does not need to be determined before partition – proceeds of sale can be held in escrow pending the outcome of contested probate and determination of parties' interest in decedent's half of property.**

Lesson: While Surrogate's Court jurisdiction is expanding in many areas, real property issues may not always be appropriately reviewed in Surrogate's Court if living parties are involved and the property is located in a different venue.

Speaker Biographies

Anne C. Bederka, Esq.

Anne C. Bederka is a member of Greenfield Stein & Senior, LLP. The focus of her practice is trusts and estates litigation and Surrogate's Court matters. Anne represents both fiduciaries and beneficiaries in a wide range of contested matters, including will and trust proceedings, accounting proceedings, construction and reformation proceedings, proceedings for advice and direction, and proceedings for revocation of letters.

Anne previously served as Principal Law Clerk to Honorable Kristin Booth Glen in the New York County Surrogate's Court. She was a co-author of Harris 6th Edition New York Estates: Probate, Administration and Litigation (2013-2016) and has been a recurring panelist for the New York State Bar Association's certified training program, "What You Need to Know as a Guardian ad Litem." Anne has written and lectured on many topics, including will and trust contests, evidentiary issues in trusts and estates litigation, fiduciary best practices, and ethical issues for trusts and estates attorneys. Anne has served as a court-appointed discovery referee and as guardian ad litem in Surrogate's Court matters, both contested and uncontested. She has been a recurring guest lecturer on trusts and estates litigation at Cornell Law School, Fordham Law School, and CUNY Law School.

Timothy B. Borchers

Timothy B. Borchers *is a partner in the Greater Boston firm of Borchers Trust Group, P.C. and the creator of the Inheritance Trust™ and other trademarked estate planning and settlement techniques, including the Heirloom Ownership Trust™. He practices in the fields of estate and tax planning, real estate, asset protection, trust and estate settlement, and serves in trustee capacities. Tim holds the Estate Planning Law Specialist™* and Accredited Estate Planner®** (EPLS™, AEP®) designations. He is the creator of the Heirloom Ownership Trust™ tool kit for attorneys and a co-creator of www.SecondHomeSavvy.com. He speaks frequently on the topic of second home succession planning and teaches estate planning for bar, CPA and trade organizations. He was awarded the Going Green Award by the Massachusetts Bar Association for innovation in "greening" the practice of law. He is licensed in Massachusetts and New Hampshire, a member of WealthCounsel™ LLC, and has twice been president of the Massachusetts Forum of Estate Planning Attorneys. Tim earned his law degree from Boston College School of Law, where he was Case Editor of the UCC Reporter Digest, and his undergrad from Bowdoin College,* summa cum laude*, and is an accomplished classical tenor. Tim grew up spending summer weeks at Sandy Pond near Pulaski, NY. He and his wife Ruth started their own tradition on Lake Winnipesauke in NH. Reach him at tim@borcherslaw.com. (*Certified by the Estate Law Specialist Board, Inc., an American Bar Association-accredited certification. **Accredited by the National Association of Estate Planners & Councils.)*

Christopher A. Cahill *is a Partner in Twelve Points Wealth Management in Concord, Mass. and Principal of the Twelve Points Family Office division, which provides concierge services for high net worth individuals. He has a concentration in financial plans for lawyers and law firms. Prior to financial services, Chris practiced in the field of estate planning. Chris is a lawyer, Certified Financial Planner® (CFP®), and a Chartered Advisor in Philanthropy® who has spent over 20 years helping wealthy families develop and implement complex and coordinated estate, financial and philanthropic plans. He holds a degree in Finance and Management from Northeastern University and a J.D. from Massachusetts School of Law. Chris is a co-creator of www.SecondHomeSavvy.com and can be reached at Chis@twelvepointswealth.com.*

Quincy Cotton

Quincy Cotton works with high net worth individuals and principals of closely held businesses to develop succession and estate plans that identify and address the challenging issues necessary to achieve overall family, business and tax goals. She works with families and family enterprises that hold a wide variety of business and investment assets, structuring insurance trusts, dynasty trusts, defective grantor trusts, grantor retained annuity trusts, qualified personal residence trusts and charitable trusts. Her understanding of the income tax aspects of partnerships and LLCs enables her to employ sophisticated planning techniques involving the use of family limited partnerships and entity freezes. She has helped clients create private foundations, establish scholarship programs, and structure gifting to achieve income, gift and estate planning goals. She counsels clients regarding pre-nuptial agreements, life insurance proposals, special planning for generation-skipping transfers, and post-mortem planning, including tax elections and disclaimers. In connection with estate planning and administration, she has advised clients regarding estate tax deferral for estates with significant closely held business interests. She has also counseled non-U.S. individuals present in the United States, as well as U.S. citizens on assignment abroad on income, gift, and estate tax planning related to changes in residence or citizenship. She received a B.A. magna cum laude from Boston University and her J.D. magna cum laude from the State University of New York at Buffalo.

LEVENE GOULDIN &THOMPSON, LLP
ATTORNEYS AT LAW
450 PLAZA DRIVE, VESTAL, NY 13850
607-763-9200
AKUKOL@LGTLEGAL.COM

Albert B. Kukol

Albert B. Kukol is Assistant Managing Partner in the law firm of Levene Gouldin & Thompson, LLP, Binghamton, NY. His areas of practice include elder law, trusts and estates and real estate. He was admitted to the NYS Bar in 1991. He is a graduate of Albany Law School (J.D.), Binghamton University (M.B.A.), and William and Mary (A.B.). Prior to becoming an attorney, he was Manager of Budgeting and Cost Accounting for United Health Services, Inc., Binghamton, NY.

He has been selected for inclusion in "The Best Lawyers in America® in Elder Law and recognized as a Super Lawyer again in the area of Elder Law. He is a Certified Financial Planner (CFP®). He is a member of the National Academy of Elder Law Attorneys, the Academy of Special Needs Planners, the Broome County Bar Association, the NYS Bar Association (Elder Law Section and the Trust and Estate Section) and the Financial Planning Association. He is a member of the Board of Directors of the regional Financial Planning Association.

He has been a speaker at numerous community presentations and at continuing legal education for members of the Bar. These include both local bar and New York State Bar Continuing Legal Education programs for the Elder Law and Trust and Estate Sections, such as Advanced Institutes for the Elder Law Practitioner (Homestead Transfers; Nursing Home Admissions; Supplemental Needs Trusts and Medicaid Liens), as well as on Elder Law, Medicaid Eligibility, Real Estate, Supplemental Needs Trusts, Charitable Trusts, Life Estates and Oil and Gas Tax Planning.

FARRELLFRITZ P.C.
BECAUSE SUCCESS MATTERS.

Joseph T. La Ferlita

Trusts & Estates

Partner | 516-227-0714 | jlaferlita@farrellfritz.com

LOCATION: Uniondale

Joseph T. La Ferlita is partner to the firm concentrating his practice in trusts and estates law, with an emphasis on estate planning, estate and trust administration, and tax controversy. He counsels individual planning clients, beneficiaries, individual and corporate fiduciaries, and not-for-profit entities, including public charities and private foundations, in connection with a multitude of estate and trust-related matters. These include, among others, the drafting of wills and trusts, estate tax and generation skipping tax planning, audits of estate tax returns and income tax returns, the formation of not-for-profit entities, obtaining Private Letter Rulings from the Internal Revenue Service, probate proceedings, administration proceedings, judicial accounting proceedings, judicial proceedings for advice and direction on behalf of executors and trustees, spousal elective share proceedings, and proceedings for the construction and reformation of wills and trusts. He represents clients in the Surrogates Court and the United States Tax Court.

Mr. La Ferlita is admitted to practice in the State of New York, the Commonwealth of Massachusetts and the United States Tax Court. He is a member of the American and New York State Bar Associations.

Mr. La Ferlita is especially active in the Trusts and Estates Law Section of the New York State Bar Association, where he serves as District Representative for Nassau and Suffolk Counties, Chairman of the Surrogates Court Committee and Member of the Estate and Trust Administration Committee. He plays a key role in drafting proposals for new and amended estate-related New York statutes, some of which ultimately have been signed into law by the Governor of New York State.

In 2002, Mr. La Ferlita was a Judicial Intern to the Honorable Thomas C. Platt of the United States District Court, EDNY.

Mr. La Ferlita has had two LexisNexis Expert Commentaries published on Lexis.com. The first is entitled, “Whether the Distinction Between Construction and Reformation Proceeding in New York Surrogate Courts Still Exists.” The second is entitled, ” The Fundamentals of the Separate Share Rule.” He has also published articles regarding Trust Decanting in New York and New York Trust Law in the NYSBA ***Trusts and Estates Law Section Newsletter,*** the The American Bar Association's ***Property & Probate***, and The Suffolk Lawyer.

Mr. La Ferlita was selected for the *Super Lawyers New York Metro Rising Stars* (Estate & Probate) list in 2013 and 2014.

In May 2011, Mr. La Ferlita received an LL.M. degree in taxation from New York University School of Law. He received his Juris Doctor degree, Dean’s List, from St. John’s University School of Law in 2004, where he served as a member of the ***American Bankruptcy Institute Law Review***. Mr. La Ferlita earned his M.A. degree in Theology from Boston College in 1998 and his B.S. degree in Biology from Fairfield University in 1996.

Prior to attending law school, Mr. La Ferlita was a high school teacher for several years in the Boston area.

Office
Uniondale
400 RXR Plaza
Uniondale, NY 11556

Practice Areas
Trusts & Estates
Tax

Education
Boston College (MA)
Fairfield University (BS)
New York University School of Law (LL.M.)
St. John’s University School of Law (JD)

Ellen G. Makofsky, Esq.

Makofsky & Associates, P.C.

Makofsky & Associates, P.C.
600 Old Country Road • Garden City • NY 11530
Phone: 516.228.6522 • Fax: 516.228.6525
Email: Ellen@MakofskyLaw.com
Website: MakofskyLaw.com

ABOUT MAKOFSKY & ASSOCIATES, P.C.:

Ellen G. Makofsky has concentrated her practice in Elder Law and Trusts and Estates since 1991 and she handles matters related to: Long Term Care Planning; Estate Planning (Wills and Trusts); Probate and Estate Administration; Medicaid Planning and Applications; Tax Planning; Special Needs Planning; Guardianship Proceedings; Disability Planning; Powers of Attorney; and Advance Directives.

ABOUT ELLEN G. MAKOFSKY:

Certified Elder Law Attorney "CELA"
2018 -2009 SuperLawyer
2018-2014 Best Lawyer
2013-2011 Top 100 SuperLawyer
2010 Woman of Distinction
2015, 2013, 2012 and 2011 Top 50 Women SuperLawyer
Secretary of the New York State Bar Association-3 terms
Member of The House of Delegates of the New York State Bar Association 11 year term
Member of the Executive Committee of the New York State Bar Association 7 year term
Member of The New York Bar Foundation Board of Directors
Vice Chair of the Finance and Investment Committee of The New York Bar Foundation
Fellow of the New York Bar Foundation
Chair New York State Bar Association Task Force on Powers of Attorney
Served as President or Chair of the following organizations:
- National Academy of Elder Law Attorneys, New York Chapter
- The New York State Bar Association Elder Law and Special Needs Section
- Estate Planning Council of Nassau, Inc.
- New York State Bar Association Committee on Women in the Law
- Long Island Alzheimer's Foundation "LIAF" Legal Advisory Board
- Sun Council, Inc.
- Senior Umbrella Network of Nassau
- Senior Umbrella Network of Queens
- Gerontology Professionals of Long Island, Nassau Chapter

Received Awards from the following institutions:
- 2018 Best Law Long Island Elder Law Lawyer of the Year
- 2017 Lifetime Achievement Award – LI Business News
- National Academy of Elder Law Attorneys, Inc. ("NAELA")
- New York State Bar Association
- The Long Island Alzheimer's Foundation
- The Visiting Nurse Association of Long Island
- The Nassau County Bar Association
- 2013 Access to Justice Champion
- 2014 Top 50 Women –LI Business News

FRANCES M. PANTALEO, ESQ.

Frances M. Pantaleo is a partner at Bleakley Platt & Schmidt LLP, and the head of its Elder Law and Special Needs Planning groups. She handles a broad range of matters with a particular emphasis in the areas of elder law, estate planning, drafting wills and trusts, probate and administration of estates, guardianship proceedings under Article 81 of the Mental Hygiene Law and Article 17A of the Surrogate's Court Procedure Act, and drafting and administration of supplemental needs trusts.

Ms. Pantaleo is a Past-Chair of the Elder Law and Special Needs Section of the New York State Bar Association and a member of the National Academy of Elder Law Attorneys. She has previously served as Chair of the Elder Law Committees of the Westchester Women's Bar Association and the Westchester County Bar Association. Ms. Pantaleo has received an AV rating from the Martindale-Hubbell peer review, the highest rating available, for her legal skills and ethical standards.

Ms. Pantaleo received her J.D. from New York University Law School in 1979 and is a *summa cum laude* graduate of Brooklyn College, CUNY. Ms. Pantaleo has been recognized as both a "Best Lawyer" and a "Super Lawyer" in the area of Elder Law. In 2007, Ms. Pantaleo received a Partner in Justice Award in recognition of her outstanding pro bono assistance to Legal Services of the Hudson Valley. Ms. Pantaleo has served on the Board of the Hudson Valley/Rockland/Westchester Chapter of the Alzheimer's Association. She is a frequent lecturer on elder law and special needs planning for professional education programs for attorneys and financial professionals and to community organizations such as The Alzheimer's Association, AARP, UJA-Federation, The Pace Women's Justice Center, Westchester ARC and Senior Law Day programs offered by Westchester County Department of Senior Services and programs.

Hon. Stacy L. Pettit

Albany County Surrogate's Court
Albany County Courthouse, Chambers Rm. 118
16 Eagle Street, Albany, New York 12207

518.285.8585
spettit@nycourts.gov

PROFESSIONAL ADMISSIONS AND EDUCATION:

Admitted to practice law January 1985 in the State of New York and the US District Court for the Northern District of New York.

Albany Law School of Union University, Albany, NY, **J. D.** June 1984

Vassar College, Poughkeepsie, NY, **A.B. in English** May 1981

LEGAL AND JUDICIAL EMPLOYMENT:

Surrogate's Court Judge, Albany County Surrogate's Court, Albany, NY, January 1, 2015 – present
Preside over probate proceedings and will contests, administration of estates, lifetime trusts and testamentary trusts, adoptions of minors and adults, guardianships of minors and developmentally disabled persons, property guardianships, wrongful death proceedings, reformation of trusts and will construction proceedings, accountings of estates, trusts and powers of attorney. Implement mandatory e-filing and improved court management and case tracking to better serve court users. Published decisions: Matter of Conway, NYLJ 1202743988431 (Sur Ct, Albany County 2015) (Summary judgment denied, as issues of fact exist as to the decedent's testamentary capacity and undue influence); Matter of Cropsey, NYLJ 1202763437881 (Sur Ct, Albany County 2016) (Declining to probate will, where sole beneficiary of decedent's will was found in an earlier Article 81 guardianship proceeding to have unduly influenced decedent]); Matter of Falgiano, NYLJ 1202747182210 (Sur Ct, Albany County 2016) (Granting executor reargument, and adhering to prior decision limiting attorney-executor's statutory commissions); Matter of Donohue, NYLJ 1202769434205 (Sur Ct, Albany County 2016) (Respondent trust beneficiary lacks standing to object to parts of accounting unrelated to his outright interest); Matter of Benson, NYLJ, Aug. 8, 2017 at 31 (Sur Ct, Albany County 2017) (Administrator surcharged amount necessary to satisfy siblings' entitled-to share of estate); Matter of Walsh, NYLJ, Aug. 29, 2017 at 31 (Sur Ct, Albany County 2017) (Petition by decedent's brother for removal of administrator, who is decedent's ex-spouse and legal guardian of property of decedent's sole heir, denied); Matter of Marriott, NYLJ, Oct. 10, 2017 at 32 (Sur Ct, Albany County 2017) (Summary judgment granted appointing named executor, whom respondent alleged had dementia and lacked capacity to act); Matter of Cagino, NYLJ, Dec. 19, 2017 at 41 (Sur Ct, Albany County 2017) (Motion to transfer a Kings County partition action regarding decedent's estate's half interest in Brooklyn real property to this Court, in which decedent's contested probate proceeding was pending, denied); Matter of Baby Girl M., NYLJ, February 23, 2018 at 35 (Sur Ct, Albany County 2018) (After trial of this contested adoption proceeding, the court held that, while the child would have a home and be financially cared for by either side, petitioners' superior ability to provide emotional and intellectual development as mature young parents surrounded by supportive family, as well as the emotionally stable quality of their home environment, are the factors that show clear and convincing evidence that the best interests of the child would be served by completing the adoption of the child by petitioners); Matter of Tinsmon, __ Misc 3d __, 2018 NY Slip Op 28238 (2018) (Determining that trustees of a first party supplemental needs trust have discretion to purchase real property and determine whether or not the property should be titled to the beneficiary, in the name of the guardian of the beneficiary, or in the name of the trust, while taking into consideration the impact of such titling on the trust beneficiary's eligibility for means-tested benefits). Also serve as member of Albany County Jury Board, mentor judge to Ulster Surrogate, and preside over Albany and Rensselaer County in rem proceedings as Acting County Court Judge.

Principal Appellate Court Attorney, Supreme Court, Appellate Division, Third Department, Albany, NY, March 2012 – December 31, 2014
Assist the Court's Presiding and Associate Justices with decisions, determination of motions and orders to show cause, the Article 81 guardianship examiner program and the assigned counsel program.

Surrogate's Court Chief Clerk, **Albany County Surrogate's Court**, Albany, NY, Feb 2001 – March 2012
Perform legal review of pleadings filed with the court, conduct calendar appearance return dates, examinations of witnesses and court conferences, perform legal research and draft court decisions, orders and decrees. Supervise court personnel and assist court users and counsel in Surrogate's Court practice and procedure. Implement UCMS court database and manage court caseload, resources, court financial accounts, court budget, statistical reports and records management to provide efficient and timely service to all court users.

Law Clerk to Hon. Raymond Marinelli, Albany County Surrogate's Court, part-time Sept 1999 – Feb 2001
Research and draft court decisions, orders and decrees, conduct pre-trial and settlement conferences, and assist court personnel in various Surrogate's Court proceedings including probates, administrations, accountings, guardianships, adoptions and wrongful death compromises.

Examiner of Guardianships, Albany County Surrogate's Court, appointment Jan 1998 – Sept 1999
Court appointed by Hon. Raymond Marinelli to review annual property guardianship accountings and petitions for withdrawals of guardian funds, to prosecute compliance with accounting requirements of guardians of infants and persons under disability, and to pursue recovery of funds misused by guardians.

Partner, O'Connor & Pettit, Albany, NY, July 1993 – Feb 2001
Founding partner of private law firm, with concentration in estate and trust administration, Surrogate's Court practice and litigation, estate and tax planning, real property and elder law.

Associate, Zubres, D'Agostino, Hoblock & Greisler, P.C., Albany, NY, Dec 1989 – July 1993
Attorney in private practice of law, concentrating in estate and trust administration, Surrogate's Court practice and litigation, estate and tax planning.

Associate, Tabner & Laudato, Albany, NY, Nov 1987 – Dec 1989
Attorney in private practice of law, concentrating in estate and trust administration, Surrogate's Court practice and litigation, estate and tax planning.

Associate, Ainsworth, Sullivan, Tracy, Knauf, Warner, & Ruslander, Albany, NY, Sept 1984 – Nov 1987
Attorney (and law clerk prior to bar admission) in private general practice of law, concentrating in estate and trust planning and administration, Surrogate's Court practice, business and tax planning and real estate. Also practice and gain experience in civil litigation, family, contract and tort law.

PROFESSIONAL MEMBERSHIPS AND OFFICES:
New York State Surrogates' Association Member, Committee on Standards and Goals
Judicial Institute Curriculum Advisory Committee Member for NYS Office of Court Administration
New York State Bar Association, **Sustaining Member,** having served as:
- **DELEGATE to the New York State Bar Association House of Delegates**
- **CHAIR and VICE-CHAIR of the Surrogate's Court Committee** of Trusts and Estates (T&E) Section
- **EXECUTIVE MEMBER** of the T&E Section **as Member at Large**
- **EXECUTIVE MEMBER** of the T&E Section **as Third District Representative**

MEMBER of the T&E Section **Continuing Legal Education Committee**
MEMBER of the Judicial Section
Capital District Women's Bar Association Sustaining Member
Albany County Bar Association Sustaining Member
New York State Association of Chief Clerks of the Surrogate's Court, 2001 – 2012
Vice President, 2011 – 2012
Supreme Court, Appellate Division, Third Department, having served as:
MEMBER of the Continuing Legal Education Committee
CO-CHAIR of the Committee on Article 81 Guardianships
Office of Court Administration of the State of New York, having served as:
MEMBER of the Examination Committee for New York Surrogate's Courts
MEMBER of the Forms Committee for Surrogate's Courts
The New York Bar Foundation
FELLOW, Maryann Saccomando Freedman Circle
Supervising Judge of Trusts and Estates Fellowship recipients, Summers 2016 and 2018
Albany Law School
Supervising Judge for Law Student Interns in Surrogate's Court, 2015 to present

PUBLICATIONS AND PRESENTATIONS OF CONTINUING LEGAL EDUCATION AND PUBLIC SERVICE SEMINARS:

"SURROGATE'S COURT PROCEEDINGS AND ISSUES -- An Insider's View" – Published articles in monthly Albany County Bar Association Newsletter, coauthored with chief clerk and court attorney:

Commissions Payable on an Estate, July/August 2018
Ethics: Schneider v Finmann and Surrogate's Court Practice, June 2018
Hot off the press!! New Surrogate's Court Probate and Administration Petitions, May 2018
Nothing is Certain Except for Death and Taxes, April 2018
When a Fiduciary Dies Before the Estate or Trust is Closed, March 2018
Foreign Estates, February 2018
You are Necessary! (Proper parties to proceedings), January 2018
Digital Assets in the Digital Age, December 2017
I Have a Claim! (Claims against estates), November 2017
Was There a Gift, or Wasn't There? (Proof a gift was made by a decedent), October 2017
Adult Adoptions, July/August 2017
You DO Belong Here! -- Surrogate's Court Subject Matter Jurisdiction, June 2017
E-filing Protocols are Here! May 2017
Compromising a Wrongful Death Proceeding, April 2017
Children and Money: SCPA Article 17 Guardianships, March 2017
Real Property and Estate Administration: A Trap for the Unwary, February 2017
Should Your Client Contest Probate? Ask for 1404 Examinations! January 2017
Mandatory E-Filing Has Begun in Albany County Surrogate's Court, December 2016
The Substantive Law of Wills: Refresher, November 2016
A Spouse's Right to Estate Assets – The Right of Election, October 2016
Do Not Underestimate the Power of Exempt Property, July/August 2016
Probate Proceedings – Who, What, Where and How? June 2016
Intestate Administration – Who, What, Where and How? May 2016
Hot off the Press! New Surrogate's Court Forms and Rules, April 2016
You've Been Served – SCPA-Style! March 2016
Issues in Intestate Succession, February 2016
An Overview of Small Estates (SCPA Article 13), January 2016

Closing the Estate or Trust – Formal or Informal Accounting? December 2015
Renunciations and Disclaimers of Estate Interests, November 2015

"Administration and Probate Procedures and Pointers"
04/19/2018 – Speaker, writer for Albany County Bar Association CLE

"Guardian ad Litem Official Training: What You Need to Know as a Guardian ad Litem"
02/27/2018 – Speaker for NYSBA CLE

"A View from the Bench: Guardianship Issues and Challenges"
11/07/2017 – Speaker, panelist for 2017 ARC of New York Guardianship Training Symposium

"Surrogate's Court Subject Matter Jurisdiction"
10/24/2017 – Speaker, writer of seminar for OCA Surrogate's Court Clerks Associations

"Conducting SCPA 1404 Discovery"
09/25/2017 – Speaker at mock contested probate 1404 examination for NYSBA CLE

Office of Court Admin. 2017 Judicial Institute – "The Surrogate's Court Subject Matter Jurisdiction"
06/20/2017 and 07/25/2017 – Speaker, writer of seminar for NYS judges

Albany Law School Judicial Field Placement Seminar – "Surrogate's Court Litigation"
03/08/2017 – Presenter at Albany Law School (for Prof. Rachael Kretser)

"Beyond Uncontested Probate – Practicing in Surrogate's Court"
03/02/2017 – Speaker, writer for Albany County Bar Association CLE

"Guardian ad Litem Official Training: What You Need to Know as a Guardian ad Litem"
05/19/2016 – Speaker for NYSBA CLE

"Competent Estate Planning - What You Need to Know"
03/29/2016 – Speaker, writer for Albany County Bar Association CLE

"Guardianships of Developmentally Disabled Individuals and Special Needs Trusts"
01/26/2016 Speaker on panel of Surrogates for NYSBA Annual Meeting CLE

"Estate Planning and Will Drafting"
12/04/2015 – Speaker, co-chair and moderator for NYSBA CLE

"Ethics in Surrogate's Court Proceedings"
10/27/2015 - Speaker, writer for NYS OCA Surrogate's Court Clerks Association CLE

"Surrogate's Court Proceedings and Issues – An Insiders' View "
05/19/2015 – Speaker, writer for Appellate Div., Third Department in-house CLE

"Trust Me? To Bond or Not to Bond"
04/24/2015 – Writer, speaker on panel of Surrogates for NYSBA CLE

"Ethics in Surrogate's Court"
03/12/2015 – Speaker, writer for Schenectady County Bar Association CLE

"Probate and Administration of Estates"
12/12/2014 – Speaker, chair and moderator for NYSBA CLE

"Discovery Proceedings in Surrogate's Court"
05/29/2014 – Chair and moderator for NYSBA CLE

"An Introduction to Estate Planning"
10/30/2013 – Speaker, chair and moderator for NYSBA CLE

"Contested Accounting Proceedings in Surrogate's Court"
05/14/2013 – Speaker, chair and moderator for NYSBA CLE

"Estate Planning Basics"
04/2013 – Speaker, writer for Appellate Div., Third Department in-house CLE

"Uncommon Procedural Issues in Surrogate's Court" (annually 2002-2011), **"To Bond or Not to Bond," and "Complex Accounting Issues in Surrogate's Court"** - Speaker, writer for NYS OCA Surrogate's Court Clerks Association CLEs

"Estate Planning and Will Drafting"
10/19/2010 – Speaker for NYSBA CLE
"What You Need to Know as a Guardian ad Litem"
12/03/2008 – Chair and moderator for NYSBA CLE
"Probate and Administration of Estates"
10/23/2008 – Speaker for NYSBA CLE
"Inheritance In New York - Legal Issues affecting Estate Administration"
12/02/2007 – Speaker, writer for New York State Legislature in-house CLE
"Trust Your Planning: A Review of Trust Planning and Drafting Techniques"
05/16/2007 – Speaker, chair and moderator for NYSBA CLE
"Surrogate's Court Proceedings"
05/17/2006 – Speaker for NYSBA CLE
"Probate and Administration of Estates"
10/24/2006 – Speaker for NYSBA CLE
"Estate Planning and Will Drafting"
10/06/2005 – Speaker, co-chair and moderator for NYSBA CLE
"Estate Planning Basics"
05/25/2005 – Speaker, co-chair and moderator for NYSBA CLE
"Probate and Administration of Estates"
10/29/2004 – Speaker, chair and moderator for NYSBA CLE
"Settling an Estate"
05/17/2004 – Speaker, chair and moderator for NYSBA CLE
"Estate Planning and Will Drafting"
10/30/2003 – Speaker, chair and moderator for NYSBA CLE
"Estate Planning for the Middle-Class Client"
06/04/2003 – Speaker, co-chair and moderator for NYSBA CLE
"What You Need to Know as a Guardian ad Litem"
05/05/2003 – Chair and moderator for NYSBA CLE
"Estate Litigation"
11/04/2002 – Speaker for NYSBA CLE
"Probate and Administration of Estates"
10/30/2002 – Speaker, chair and moderator for NYSBA CLE
"Trust Planning and Taxation"
05/29/2002 – Speaker, chair and moderator for NYSBA CLE
"Estate Planning and Will Drafting"
10/16/2001 – Speaker for NYSBA CLE
"Income Taxation of Decedents, Their Estates, and Their Trusts"
05/15/2001 – Speaker for NYSBA CLE
"Probate and Administration of Estates"
09/28/2000 – Speaker for NYSBA CLE
"Surrogate's Court Proceedings"
05/10/2000 – Speaker for NYSBA CLE
"Estate Planning and Will Drafting"
11/16/1999 – Speaker for NYSBA CLE
"Settling an Estate"
05/21/1999 – Speaker for NYSBA CLE
"Probate and Administration of Estates"
10/22/1998 – Speaker for NYSBA CLE

"Lifetime Trusts, Estate and Gift Taxation"
05/28/1998 – Speaker for NYSBA CLE

"State May Retain More Retirees with New NY State Estate Tax Law" – Author, published in Capital District Business Review 11/24/1997

"Estate Planning and Will Drafting"
09/24/1997 – Speaker for NYSBA CLE

"Fiduciary Income Tax Planning"
05/22/1997 – Speaker for NYSBA CLE

"Probate and Administration of Estates"
09/25/1996 – Speaker for NYSBA CLE

"Estate Planning and Will Drafting"
05/23/1996 – Speaker for NYSBA CLE

"Estate Planning for Parents of Minor Children"
06/15/1995 – Public service information seminar at Bethlehem Preschool, Glenmont, NY

"Basic Inheritance Law and the Spousal Right of Election"
04/26/1995 – Speaker for NYS CLU/ChFC Association CLE

"Probate and Administration of Estates"
10/18/1994 – Speaker for NYSBA CLE

"Estate Planning and Will Drafting"
09/29/1994 – Speaker for NYSBA CLE

"Lifetime Trusts, Estate and Gift Taxation"
05/12/1994 – Speaker for NYSBA CLE

"Long-term Care Planning Options and Considerations" (Public service information seminars)
02/20/1997 – for International Assoc. for Financial Planning; 06/09/1994 – for Schenectady Parkinson's Disease Support Group; 04/27/1994 – for Albany Parkinson's Disease Support Group; and 06/23/1992 – for Joint Meeting of Parkinson's Disease Support Groups

"**Pre-retirement Estate and Trust Planning"**
1993 – 1998 for NYS Office for the Aging's conferences for New York State employees

"Business Tax Deductions"
5/23/1994 – Speaker for NYS Office for the Aging's conference for New York State employees

"Health Care Proxies and DNR Law"
03/16/1993 – Public service information seminar at St. Mary's Hospital

"Establishing Guardianships of Person and Property for Disabled Adults"
02/09/1993 – Public service information seminar at conference of Disability Service Providers

"Funding and Operating Living Trusts" – Author, published in "Planning Opportunities with Living Trusts in New York", copyright 1992, by National Business Institute, Inc.

Seminars on Probate, Living Trusts and Health Care Planning Documents for the Public
Public service information speaker at several annual Senior Citizens' Law Days and Health Care Planning Days, sponsored by Albany Law School

PERSONAL INFORMATION

Raised in Omaha, Nebraska, Stacy met her spouse while in college in the late 1970's, made New York a permanent home when she began law school in 1981, and she and her spouse successfully raised three adult sons in Albany County, New York while she worked full time as an attorney.